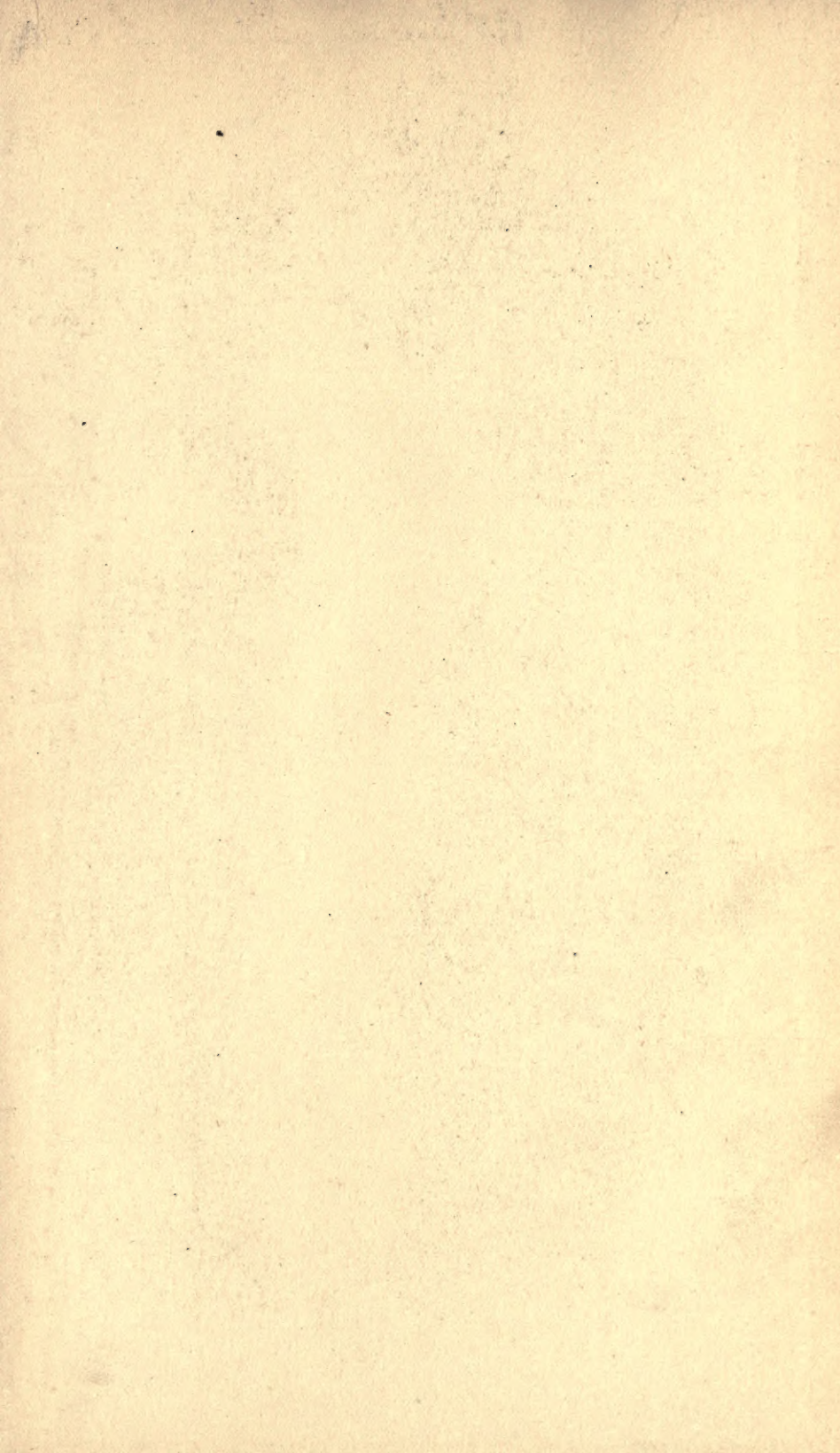
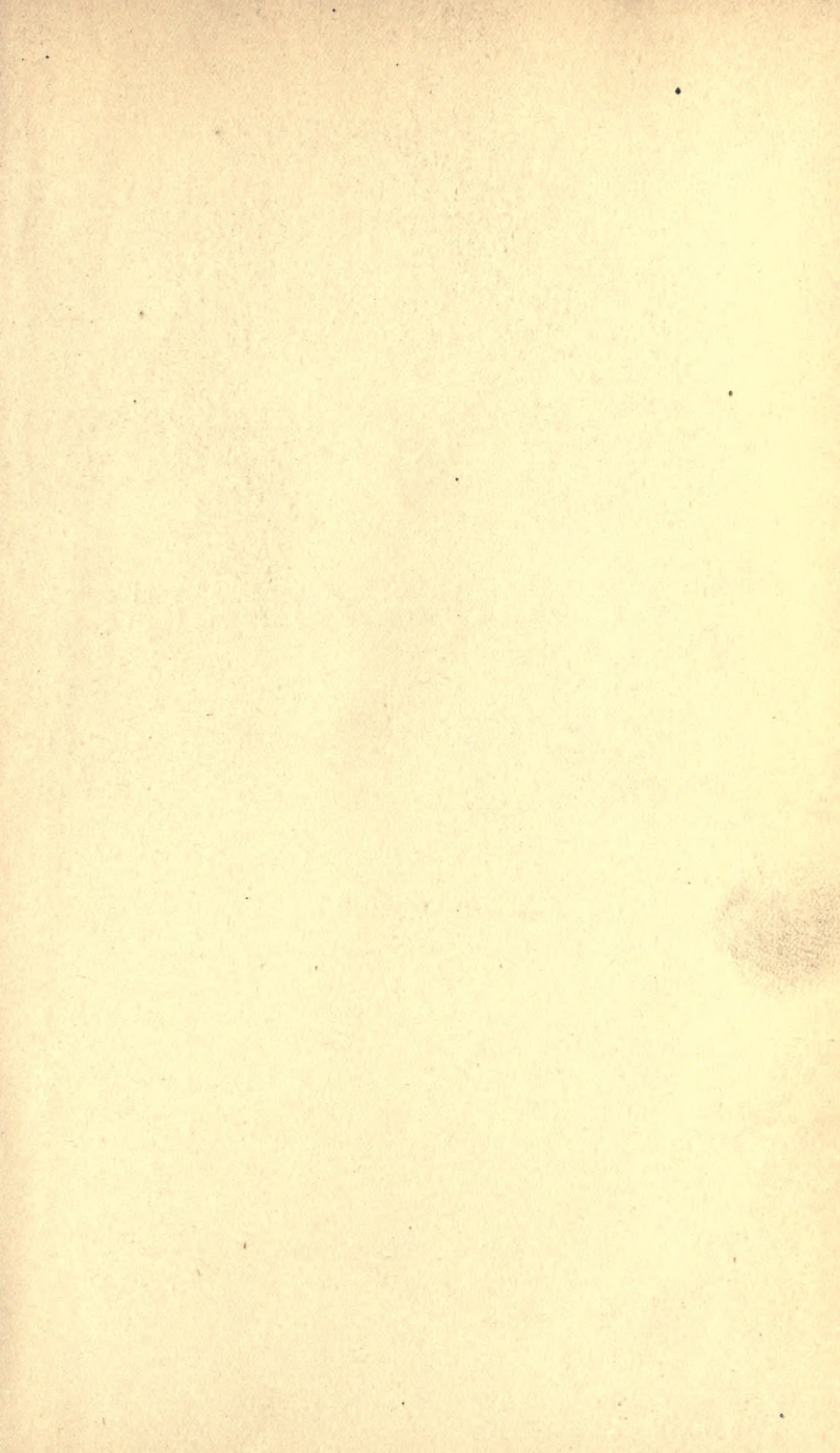




UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY





PATTEE SERIES

ILLUSTRATIVE CASES

IN

CRIMINAL LAW

WITH ANALYSIS AND CITATIONS

BY

JAMES PAIGE, M. A., LL.M.

^m
Professor of Law in the College of Law, University of Minnesota

PHILADELPHIA
REES WELSH & CO.

1897

T

P 1528

C

1897

Copyright, 1897,
REES WELSH & CO.

334565

9.19.60

D. L. H.

9-27-60

PREFACE.

TEACHING the fundamental principles of law by means of actual cases illustrative of the meaning, limitations and scope of those principles is now admitted, I think, to be the most successful method of training young men for the bar, as it is certainly the most effectual method of educating and disciplining the mind.

The "case lawyer" is denounced. If by that term is meant, as is usually true, that, having a case to conduct, he goes to the reports in search of another whose facts resemble the one he has to consider, ignoring the *principle* of law applicable to all cases of that class, the denunciation is merited; but the lawyer who consults the authorities extensively and thoroughly for a knowledge of *principles* and the just limits of their application, is the one whose merits and success are sure of recognition.

The "Series," of which this volume is one, is designed to present the fundamental principles of the branches of law considered, and to furnish the student with abundant citations of authority where he can learn how judges have regarded those principles and what limitations and modifications they have recognized in their application.

With us, this method, with lectures, and in some branches of the law, text-books, has produced good results; and if this book can be made useful to others whose life and energy are devoted to the cause of legal education, that fact will be an especial gratification to its author, Mr. Paige.

The merits and value of this volume are entirely due to Mr. Paige, who has devoted to it much patient labor, extensive reading, and careful thought. His analysis of the subject so carefully prepared, is a helpful feature of the book. In the hands of students it is extremely valuable.

W. S. PATTEE, LL.D.,

University of Minnesota,

April 10, 1897.

Dean of College of Law.



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

ANALYSIS.

A. NATURE AND ELEMENTS, 1.

1. Definition, 1.
2. Intent, 1.
 - a. Kinds, 5.
 - (1) Constructive, 5.
 - (2) Specific, 10.
 - (3) Motive, 12.
 - b. Capacity as Affecting Intent, 27.
 - (1) Infancy, 27.
 - (2) Insanity, 30.
 - (a) Tests, 30.
 - (1¹) Right and Wrong, 30.
 - (2¹) Irresistible Impulse, 34.
 - (3¹) Emotional Insanity, 39.
 - (4¹) Moral Insanity, 39.
 - (b) Proof of Insanity, 39.
 - (3) Intoxication, 46.
 - (4) Coverture, 53.
 - (5) Corporations, 54.
 - c. Ignorance of Law, 63.
 - d. Negligence, 65.
 - e. Coercion or Duress, 67.
 - f. Necessity, 76.
 - g. Justification and Excuse, 88.
 - (1) Mistake of Fact, 88.
 - (2) Accident or Misadventure, 90.
 - (3) Defence, 97.
 - (a) Of Self, 97.
 - (b) Of Property, 106.
 - (1¹) In General, 106.
 - (2¹) Of Habitation, 113.
 - (4) Enforcement of Law, 121.

- (5) Public Policy, 129.
- 3. The Act, 136.
 - a. Individual, 138.
 - b. Joint, 138.
 - (1) Principals, 149.
 - (a) First Degree, 149.
 - (b) Second Degree, 151.
 - (2) Accessories, 156.
 - (a) Before the Fact, 156.
 - (b) After the Fact, 159.
 - c. Attempts, 161.
 - d. Conspiracies, 170.
 - e. Solicitations, 177.
 - f. Consent, 181.
 - g. Condonation, 184.
- B. KINDS, 185.
 - 1. Treasons, 185.
 - 2. Felonies, 196.
 - 3. Misdemeanors, 200.
- C. HOW PRESCRIBED, 203.
 - 1. By the Common Law, 203.
 - 2. By Statute, 209.
- D. JURISDICTION, 213.
 - 1. Locality, 213.
 - 2. Limits of the United States, 223.
 - 3. Limits of the States and Counties, 242.
 - 4. United States within State Limits, 248.
 - a. Exclusive Jurisdiction, 248.
 - b. Concurrent Jurisdiction, 253.
- E. SPECIFIC CRIMES, 255.
 - 1. Crimes against the Government, 255.
 - a. Treason, 255.
 - b. Crimes against Elective Franchise, 256.
 - c. Bribery, 257.

- d. Crimes against Executive Power, 261.
- e. Crimes against Legislative Power, 261.
- 2. Crimes against Public Justice, 262.
 - a. Bribery, 262.
 - b. Perjury, 264.
 - c. Forging, etc., Public Records, 271.
 - d. Rescue, 271.
 - e. Escapes, 271.
 - f. Prison Breach, 271.
- 3. Crimes against the Person, 272.
 - a. Homicide, 272.
 - (1) Elements, 272.
 - (a) Human Being, 272.
 - (b) Death, 277.
 - (1¹) Corpus Delicti, 277.
 - (2¹) Cause of, 285.
 - (3¹) Time of, 289.
 - (2) Kinds, 290.
 - (a) Justifiable, 290.
 - (1¹) In the Punishment of Crimes, 290.
 - (2¹) In the Prevention of Crimes, 291.
 - (b) Excusable, 297.
 - (1¹) Misadventure, 297.
 - (2¹) Defence, 299.
 - (a¹) Of Person, 299.
 - (b¹) Of Habitation, 300.
 - (c) Felonious, 300.
 - (1¹) Murder, 300.
 - (a¹) Suicide, 317.
 - (b¹) Resulting from Attempt, 322.
 - (1²) To Kill the Person Killed, 322.
 - (2²) To Kill Another than the Person Killed, 326.

- (3^d) To do Great Bodily Harm, 331.
 - (4th) To Commit a Felony, 333.
 - (c¹) Resulting from Resistance of Lawful Arrest, 335.
 - (2¹) Manslaughter, 339.
 - (a¹) Voluntary, 339.
 - (1st) In Passion Roused by Provocation, 339.
 - (2nd) In Resisting Unlawful Arrest, 347.
 - (b¹) Involuntary, 350.
 - (1st) In Doing an Unlawful Act; Misdemeanor, 350.
 - (2nd) In Doing a Lawful Act, 357.
 - (a²) Negligence, 357.
 - (b²) Self Defence, 357.
 - (c²) Chastisement, 357.
 - (d²) Arrest, 357.
 - b. Mayhem, 358.
 - c. Assaults, 361.
 - d. Robbery, 367.
 - (1) Taking from Person or Presence, 367.
 - (2) Force and Violence, 371.
 - (3) Fear, 377.
 - e. Libel, 380.
- 4. Crimes against the Person, Public Decency and Good Morals, 381.
 - a. Rape, 381.
- (1) Consent as a Defence, 384.
 - b. Seduction, 389.
 - c. Abortion, 392.
 - d. Adultery, 407.
 - e. Abduction, 408.
 - f. Incest, 409.
 - g. Sodomy, Bestiality, Buggery, 409.
 - h. Fornication, 409.
 - i. Gambling and Lotteries, 410.

5. Crimes against Religious Liberty, 410.
 - a. Sabbath Breaking, 410.
 - b. Violating Sepulchre, etc., 410.
6. Crimes against Property, 411.
 - a. Arson, 411.
 - (1) Elements, 411.
 - (a) Burning, 411.
 - (b) Dwelling, 412.
 - (c) Another's House, 417.
 - b. Burglary, 422.
 - (1) Elements, 422.
 - (a) Breaking, 422.
 - (b) Entry, 430.
 - (c) The Intent, 433.
 - (d) The House, 438.
 - (e) Night Time, 444.
 - c. Forgery, 446.
 - d. Larceny, 451.
 - (1) Elements, 451.
 - (a) Personal Property, 451.
 - (b) The Act, 453.
 - (c) Carrying Away, 461.
 - (d) The Intent, 465.
 - (e) False Pretence, 469.
 - (f) Embezzlement, 473.
 - (g) Malicious Mischief, 478.

TABLE OF CASES.

		PAGE
<i>Ann v. The State,</i>	11 Humph. 159	90
<i>Armour v. State,</i>	3 Humph. 370	438
<i>Arp v. The State,</i>	97 Ala. 5; 12 So. Rep. 301	67
<i>Ashworth v. State,</i>	31 Tex. Cr. Rep. 419; 20 S. W. 982	377
<i>Benton v. Commonwealth,</i>	89 Va. 570; 16 S. E. 725	196
<i>Commonwealth v. Bowen,</i>	13 Mass. 354	317
<i>Commonwealth v. Burke,</i>	105 Mass. 376	384
<i>Commonwealth v. Drum,</i>	58 Pa. St. 9	300
<i>Commonwealth v. Gerade,</i>	145 Pa. St. 289; 22 Atl. 464	39
<i>Commonwealth v. McHale,</i>	97 Pa. St. 397	203
<i>Commonwealth v. Ryan,</i>	155 Mass. 523; 30 N. E. 364	473
<i>Commonwealth v. Walden,</i>	3 Cush. 558	478
<i>Clements v. State of Georgia,</i>	84 Ga. 660; 11 S. E. 505	367
<i>Collins v. The State,</i>	88 Ga. 347; 14 S. E. 474	151
<i>Duncan v. State,</i>	7 Humph. 148	1
<i>Edmonds v. State,</i>	70 Ala. 8	463
<i>Flanagan v. The People,</i>	52 N. Y. 467	30
<i>Flanigan v. The People,</i>	86 N. Y. 554	46
<i>Franco v. State,</i>	42 Tex. 276	430
<i>Harrison v. The People,</i>	50 N. Y. 518	453
<i>Jellico Coal Min. Co. v. Common- wealth,</i>	97 Ky. 246; 29 S. W. 26	63
<i>Jennings v. Commonwealth,</i>	16 S. W. 348	326
<i>Kitchens v. The State of Georgia,</i>	80 Ga. 810; 7 S. E. 209	358

		PAGE
McGrath v. State,	25 Neb. 780; 41 N. W. 780	422
Martin v. State,	18 Tex. App. 224	253
Marvin v. State,	19 Ind. 181	209
Miller v. Florida,	15 Fla. 577	264
Miller v. The People,	5 Barb. 203	10
Molton v. The State,	105 Ala. 18; 16 So. 795	458
People v. Brown,	105 Cal. 66; 38 Pac. 518	465
People v. Burt,	51 Mich. 199; 16 N. W. 378	347
People v. Cole,	4 Park Cr. Rep. 35	291
People v. Gardner,	144 N. Y. 119; 38 N. E. 1003	161
People v. Griffin,	19 Cal. 578	444
People v. Haggerty,	46 Cal. 354	411
People v. Katz,	23 How. Pr. 93	156
People v. Kerrigan,	147 N. Y. 210; 41 N. E. 494	322
People v. Lee Kong,	95 Cal. 666; 30 Pac. 800	361
People v. Palmer,	109 N. Y. 110; 16 N. E. 529	277
People v. Taylor,	2 Mich. 250	412
People v. Van Alstyne,	144 N. Y. 361; 39 N. E. 343	389
People v. War,	20 Cal. 117	200
Price v. The People,	109 Ill. 109	433
Regina v. Dudley,	14 Q. B. D. 273	76
Regina v. Keyn,	13 Cox C. C. 403; L. R. 2 Exch. Div. 63	223
Regina v. Michael,	2 Moody C. C. 120	149
Rembert v. The State,	53 Ala. 467	446
Rex v. Van Butchell,	3 Car. & P. 629 (14 E. C. L.)	297
Roberts v. The State,	2 Head, 501	469
Snelling v. The State,	87 Ga. 50; 13 S. E. 154	335

TABLE OF CASES,

xiii

		PAGE
Snyder v. The People,	26 Mich. 106	417
State v. Bantley,	44 Conn. 537	285
State v. Bowers,	35 S. C. 262; 14 S. E. 488	177
State v. Burgdorf,	53 Mo. 65	381
State v. Burke,	30 Ia. 331; 33 Atl. 257	97
State v. Burnham,	56 Vt. 445	181
State v. Burt,	64 N. C. 619	451
State v. Curry,	1 Jones Law, 280	339
State v. Ellis,	33 N. J. L. 102	257
State v. Felter,	25 Ia. 67	34
State v. Green,	81 N. C. 560	461
State v. Hall,	114 N. C. 909; 19 S. E. 602	213
State v. Hutchinson,	36 Me. 261	407
State v. Matthews,	91 N. C. 635	471
State v. McDonald,	7 Mo. App. 510	88
State v. Mayor and Aldermen of Knoxville,	12 Lea, 146	129
State v. Miles,	36 Atlantic, 70	262
State v. Morrow,	40 S. C. 221; 18 S. E. 853	392
State v. Murray,	29 S. W. 590	333
State v. O'Brien,	3 Vroom. 169 (32 N J. L.)	357
State v. Payne,	1 Swan, 383	159
State v. Peo,	9 Houston, 488; 33 Atl. 257	100, 299
State v. Walker,	9 Houston, 464; 33 Atl. 227	312
State v. Walker,	37 La. Ann. 560	331
State v. Watts,	48 Ark. 56; 2 S. W. 342	480
State v. Winthrop,	43 Ia. 519	272
State v. Zulich,	5 Dutcher, 409 (29 N. J. L.)	248
Storey v. State,	71 Ala. 329	106
The State v. Goin,	9 Humph. 175	27
The State v. McGowan,	20 Conn. 245	415

		PAGE
The State v. O'Brien,	3 Vroom. 169 (32 N. J. L.)	65
The State v. The Morris and Essex Railroad Co.,	23 N. J. L. 360	54
Thomas v. The State,	91 Ala. 34; 9 So. 81	371
Thompson v. State,	106 Ala. 67; 17 So. 512	170
Timmons v. State,	34 Ohio St. 426	425
United States v. Greathouse,	2 Abb. (U. S. C. C.), 364	185, 255
United States v. Grush,	5 Mason, 290	242
United States v. Harmon,	45 Fed. Rep. 414	12
United States v. Rice,	1 Hughes, 560	121, 290
United States v. Taintor,	11 Blatch 374	5
Wellar v. The People,	30 Mich. 16	350
Williams v. The State,	81 Ala. 1; 1 So. 179	138
Wright v. Commonwealth,	85 Ky. 124; 2 S. W. 904, 909	113, 300
Yoes v. The State,	9 Ark. 42	136

ILLUSTRATIVE CASES

IN

CRIMINAL LAW.

A.

NATURE AND ELEMENTS.

1. DEFINITION.

A crime is a violation of a public law punishable by an action in the name of the State.

4 Bl. Com. * page 5 (Lewis's Edition); May Cr. Law, p. 1; Clark, p. 1; New York Penal Code, Sec. 3; Minn. Stat. 1894, Sec. 6287; Bishop, Sec. 32; Wharton 1, Sec. 14 *et seq*; Hawley & McGregor, p. 1.

2. INTENT.

No act is a crime unless done with a *criminal intent*, either actual or implied of law.

DUNCAN *v.* STATE.

Supreme Court of Tennessee, 1846.

7 Humph. 148.

The defendant, Duncan, was indicted and convicted in the Criminal Court of Davidson County for unlawfully carrying away a slave by steamboat. He appealed.

TURLEY, J. delivered the opinion of the court.

Robert Duncan was indicted at the April term, 1845, of the Criminal Court at Nashville, under the act of 1833, ch. 111, passed for the purpose of more effectually preventing the owners of steamboats and stage coaches, from carrying off slaves, without the knowledge or consent of the owners.

The 1st section of the act, provides, that "no stage contractor, or driver, or owner, or captain of any steamboat, or other water craft, shall receive, and carry from any place in the State, to any other place within, or out of the State, any black or colored person, unless said colored person shall produce the certificate of the clerk of the court of the county from which said stage or steamboat is about to depart; which certificate shall be under the seal of said court, stating that the said clerk has known said colored person, and that he or she is free, or has generally been reputed to be free, or that it has been proved to him, by respectable witnesses known to him, that said colored person, is free, or generally reputed so; or if said colored person, be actually a slave, then and in that case, a verbal or written authority from the owner or owners shall be sufficient."

The 2d section provides, that "if any of the persons mentioned in the 1st section, who shall be guilty of a violation of its provisions, shall be subject to indictment or presentment, in the County or Circuit Court of the county in which said colored person was so received, and upon conviction thereof, shall be fined in a sum, not less than two, nor more than five hundred dollars, and be imprisoned not less than three, nor more than six months: and moreover, shall be liable to an action of trover, at the suit of the owner or owners of any slave or slaves so received or carried away."

This statute is highly penal; and is, therefore entitled to fair, but not latitudinous construction.

The evil intended to be remedied, was one which resulted, no doubt, out of the conflict of opinion, in relation to slavery, which has for years existed between our citizens of the free and slave States, and a disposition on the part of the fanatical portion of the former, to furnish facilities and inducements to the slaves of the latter, to escape from their owners. These facilities are greatly increased on our stage lines and water courses,

by the easy mode of concealment of the absconding slave, and the rapidity with which he can be thus carried beyond the pursuit of the owner. It was, therefore, deemed proper to inflict heavy penalties upon those who might furnish such facility to an absconding slave.

But surely there could have been no reason, or design, to have inflicted such penalties upon a person, whose boat or stage had been the means of affording the facility without his knowledge?

It is a sacred principle of criminal jurisprudence, that the intention to commit the crime, is of the essence of the crime, and to hold, that a man shall be held criminally responsible for an offence, of the commission of which he was ignorant at the time, would be intolerable tyranny.

It is right and proper, that the commander of a steamboat, who receives and carries off the slave of another, should be severely punished. But to hold, that he shall be so punished, when the boat has received him and carried him off without his knowledge or consent, would be shocking to common sense.

By our law, a man who harbors a slave, is severely punished. But would any one think of punishing him, because a slave clandestinely entered and concealed himself in his house? Surely not. Then, upon what principle can the commander of a steamboat be punished criminally because a slave has entered his boat without his knowledge or consent, and been carried off by it? Surely by nothing but positive enactment. If this enactment existed, we should have to enforce it, notwithstanding our conviction of its injustice. But, we, upon a review of the statute, and a fair construction of it, feel satisfied, that it has not been so enacted.

The statute does not punish for the mere act of carrying off, but punishes for the receiving and carrying off. This makes the punishment consistent with justice, for the word receiving, necessarily implies, an act knowingly done; for no man can receive, without his knowledge and consent. A man receives a bribe; placing money in his pocket, without his knowledge, is not such a reception.

This statute, then, requiring, that there shall be a reception and carrying away of the slave, to constitute the offence provided against, both must be alleged and proven before there

can be a conviction. The carrying away would be, no doubt, *prima facie* evidence of the reception.

This bill of indictment does not allege, that the negro slave was received by the commander of the boat, but only that he was unlawfully carried away; this is not a sufficient allegation under the statute. The word unlawfully, cannot supply the defect; for the carrying away, though without knowledge, was not a legal act; and, therefore, if it be characterized by such an expression, must be called illegal.

The amended statute, passed at the same session, does not remedy this defect. It is only to be considered in the character of a legislative construction of the first statute. This amendment is to be found in the session acts of 1833, ch. 62. It provides, that when a slave conceals himself on board of the boat, and is carried off without the knowledge or consent of the commander, he shall not be liable to the pains and penalties of the statute, provided he deposit him in the first and nearest county jail to which he may be after he discovered the fact, and give public notice thereof in some convenient newspaper.

This amendment does not create an offence, or inflict a penalty. And if the construction given by it to the previous statute be erroneous, as we think it is, it does not enlarge the provisions of the first.

We are the more satisfied with the conclusion we have arrived at, in this case, because we are convinced from the proof, that the defendant in this case has been guilty of no misconduct. He did not receive the negro, and when he ascertained that he was on board of his boat, he made use of all reasonable exertions to secure him, and he fled and could not be overtaken. The defendant has then been in no default.

The bill of indictment being defective, the judgment will be arrested, and the defendant discharged.

U. S. v. Pearce, 2 McLean 14; Gordon v. State, 52 Ala. 308; Slaterry v. People, 76 Ill. 216; Reg. v. Tolson, 23 Q. B. D. 168; Chisholm v. Doulton, 22 L. R. Q. B. 736; Allen v. State, 52 Ala. 391; Ross v. Com., 2 B. Mon. 417; People v. Harris, 29 Cal. 679; U. S. v. Fox, 95 U. S. 670; Roseberry v. State, 50 Ala. 160; Riley v. State, 16 Conn. 47; Squire v. State, 46 Ind. 459; Com. v. Mash, 7 Metc. 472; State v. Bohles, 1 Rice 145; Rex v. Harris, 7 C. & P. 428; Reg. v. Allday, 8 C. & P. 136;

People v. Powell, 63 N. Y. 88; State v. Dowell, 8 L. R. A. 297; Clark, pp. 39, 42; Bishop 1, Sec. 287 *et seq.*; Wharton 1, Sec. 106 *et seq.*; Hawley & McGregor, p. 25; The Penal Code of Pa.; Shields, vol. I., 207, 390, 391, 400.

NOTE.—No intent is necessary in statutory crimes where the prohibition is absolute.

Com. v. Weiss, 139 Pa. St. 247; 11 L. R. A. 530.

a.

Kinds.

(1) *Constructive Intent.*

The law presumes that one intends the natural and probable consequences of his acts.

UNITED STATES v. TAINTOR.

Supreme Court of the United States, 1873.

11 Blatch 374.

THE defendant was indicted under the 55th section of the National Banking Act of June 3d, 1864 (13 *U. S. Stat. at Large*, 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of the Atlantic National Bank, of which he was cashier, with intent to injure and defraud the association. The indictment contained numerous counts designed to cover numerous distinct transactions, and the several transactions were, by means of distinct counts, charged as embezzlements, abstractions, and misapplications. It was averred, in each count of the indictment, that the acts were done with intent to injure and defraud the association. On the trial, before BENE-DICT, J., evidence was given to show that the defendant took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing the same with a stock-broker, as margins for stocks bought, or represented to have been bought, on his account, which were to be held by the broker subject to his order, so long as he kept with the broker a margin of ten *per cent.* The defendant offered to prove that these, his acts, were known to the president and some of the

directors of the bank, and were sanctioned by them, and that all his dealings with the funds of the bank, of which evidence had been given, were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. These offers were not made for the purpose of contradicting the proof of the commission of the acts about which testimony had been given, but only to disprove the averments in the indictment, that the acts were done with intent to injure and defraud the association. The evidence offered by the defendant was excluded, and the suggestion being made by the Court, that, in case the defendant should be advised to move for a new trial, to test the correctness of the ruling, Judges WOODRUFF and BLATCHFORD would be requested to take part in the hearing of such motion, a motion for a new trial was accordingly made and heard by the three judges.

BENEDICT, J. The ruling called in question upon this motion involved two propositions, namely, that the guilty intent charged in the indictment was shown by the proof of the acts done by the defendant; and, further, that the facts offered to be proved by the defendant would not, in law, avail to negative that intent. It has hardly been doubted, upon this motion, that the first of these propositions is correct. The correctness of the second is strenuously denied, and is now to be determined.

It is a general rule of law, that a man must be held to intend the necessary consequences of his acts. This rule is applicable as well to cases of crime as in civil causes, for, whatever proves intent anywhere proves it everywhere. It has often been so applied. Furthermore, in certain cases, and these criminal, the proof of guilty intent afforded by evidence of acts knowingly done has been held to be conclusive, and not overthrown by proof of any other facts; and this class of cases has not been limited to acts *mala in se*, nor to crimes at common law. On this argument, it was conceded, that, by virtue of the rule in question, the guilty intent is conclusively shown by proof of the act done, where the nature of the act is such that a general guilty intent is so clearly manifested thereby as to admit of no question.

It appears to us, that the rule, even thus limited, covers the present case and justifies the decision made at the trial. For, the act done by the defendant was clearly unlawful, and he is precluded from denying knowledge that it was so. He was an officer of an association created under a statute which does not permit any person to make such a use of the funds of the association as was here made. Furthermore, the act of the defendant rendered the association liable to a forfeiture of its charter. Still further, it cast upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great, extraordinary in character, and outside the bounds of proper commercial use. It placed the capital of the bank beyond the control of the officers of the association, and it was an unlawful dealing with the money of a corporation belonging to a class of institutions whose welfare is intimately connected with the public welfare, which are liable to be depositaries of the public moneys, and which cannot justly be considered to be merely private pecuniary trusts. The act of the defendant, therefore, necessarily involved injury, not only to the association, but also, in a proper sense, to the public. An act having such characteristics, and involving such consequences, when knowingly done, discloses moral turpitude, and cannot be innocent. It may, therefore, well be held, that proof of such an act proves conclusively an intent to injure, because, when knowingly done, it affords no opportunity for justification or legal excuse, and manifests so clearly a general guilty intent as to make it of no consequence what other particular intent co-existed therewith, and to preclude enquiry as to such other intent, or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other. Our opinion, therefore, is, that the circumstances offered to be proved by the defendant would not tend to disprove the guilty intent charged in the indictment.

But it is contended that the phraseology of the statute under which the indictment is framed, requires proof of something more than the general guilty intent necessarily involved in such a misapplication of the funds of a national bank, inasmuch as it couples with the words "embezzle, abstract and wilfully misapply," the words "with intent to injure or defraud the associa-

tion," and thus requires the presence of a corrupt motive, a design to cheat the association out of money, in order to constitute the offence. It is unnecessary to determine whether the latter words, as here used, are intended to be taken in connection with the words "embezzle, abstract or wilfully misapply," because this has been assumed by the prosecution, and the indictment, in each count, charges an intent to injure and defraud the association. The question presented, therefore, is as to the effect produced upon the words "embezzle, abstract or wilfully misapply," by the addition of the words "with intent to injure or defraud the association."

In considering this phraseology, it will be noticed, that, while the word "embezzle," and, perhaps, also, the word "abstract," refers to acts done for the benefit of the actor as against the bank, the word "misapply" covers acts having no relation to the pecuniary profit or advantage of the doer thereof. A design to make criminal acts done without reference to personal advantage is thus clearly disclosed, and it appears that the intention of the statute was to cover cases of unlawful dealing with the funds of the bank by its officers, although without a corrupt motive. This intention, manifested by the insertion of an emphatic and significant term in the commencement of the section, it cannot be supposed was intended to be defeated by the subsequent use of the words "with intent to injure or defraud." Nor can such effect be given these words without treating the word "injure" as synonymous with "defraud," and as referring to a misapplication for the benefit of the doer. But, if the signification of the word "defraud" be limited to a malicious dealing with property for the personal advantage of the doer—and it is not always to be so limited—the word "injure" is not of such limited application, and was doubtless inserted to cover cases of misapplication causing injury to the association without benefit to the offender. The guilty intent required by the statute would, therefore, still exist, although it be shown that no personal pecuniary benefit was anticipated by the defendant, and the requirement of the statute is fulfilled by proof of general guilty intent involved in the act knowingly committed.

The phrase "intent to injure or defraud" is the same one used in indictments for forgery. There it refers to a general

guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase should be considered to have the same meaning in this statute, and to be proved in the same way. Nor does this construction render the words nugatory. On the contrary, they are given precisely the same effect which they are held to have in indictments where their presence has been considered to be necessary. A similar effect has been given to this same phrase in other statutes. Thus Lord Ch. J. Tindal has observed, that, "where a statute directs that, to complete an offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbor." (5 C. & P., 266, note; 2 Russ. on Crimes, p. 575; *Com. v. Snelling*, 15 Pick., 340.) It is, indeed, true, that this construction of the statute under consideration imputes to the legislature the policy of making some acts criminal which may not have been before classed as crimes; and if, as it seems to be heresuggested, the moral sense of the business community has become so blunted that such acts as this defendant is conceded to have committed have come to be considered "innocent or even praiseworthy," the urgent need of the adoption of such a policy affords good ground for supposing that its adoption was intended by the statute.

Our opinion, therefore, is, that no error was committed in rejecting the evidence offered by the defence upon the trial of this cause; and the motion for a new trial must, accordingly, be denied.

State v. Goodenow, 65 Me. 30; *Reynolds v. U. S.*, 98 U. S. 145; *Com. v. Webster*, 5 Cush. 295; *Com. v. Mink*, 123 Mass. 422; *State v. Barrett*, 40 Minn. 65 & 77; *Felton v. U. S.*, 96 U. S. 699; *The Ambrose Light*, 25 Fed. Rep. 408; *U. S. v. Baldrige*, 11 Fed. Rep. 552; *Com. v. Murphy*, 42 N. E. 504; *State v. Skidmore*, 87 N. C. 509; *Ware v. Georgia*, 67 Ga. 349; *State v. Lautenschlager*, 22 Minn. 514; *State v. Gilman*, 69 Me. 163; *Com. v. McGorty*, 114 Mass. 299; *Wareham v. State*, 25 Ohio St. 601; *Angell v. State*, 36 Tex. 542; but see *Filkins v. People*, 69 N. Y. 101; *Clark*, p. 48; *Bishop L.*, Sec. 31 *et seq.*; *Hawley & McGregor*, p. 27.

(2) Specific Intent.

A specific intent being an essential ingredient of the crime, it will not be presumed but must be proved.

MILLER *v.* THE PEOPLE.

Supreme Court of New York, 1849.

5 Barb. 203.

By the Court, HURLBUT, P. J. The defendants were indicted for that being scandalous and evil disposed persons, and contriving and intending the morals of divers good and worthy citizens to debauch and corrupt, on the twelfth day of July, 1847, at the city and county of New York, in the presence of divers good and worthy citizens of this State then and there being, in a public manner, unlawfully, scandalously and wickedly did expose to the view of the said persons so present, the bodies and persons of them, the said defendants, naked and uncovered, for the space of one hour, to the manifest corruption of good morals, &c.

The evidence shows that the defendants, early in the morning of the day stated, went out of their house into the back yard of the premises which they occupied, without having completed their toilette. The witness, Deere, testified that while he was out looking at flowers he discovered that one of them was not dressed—that all his clothes were off but his under garment, and that in fact, he stood in his shirt near the back door of his house. The other defendant walked in the yard with his shirt on, and with his clothes down about his feet. Mrs. Deere was on the alert and called her husband's attention to this circumstance. The defendants were shown to have been bachelors, advanced in years, and entertained no females about their premises. There was a fence about five feet high surrounding the yard in which the offence was alleged to have been committed. But two or three persons were so unfortunate as to have observed the conduct complained of; and there was no satisfactory evidence to

show that the defendants supposed they were seen by any body, or that they intended to expose their persons to the public view. Excepting two houses there were no dwellings within a quarter of a mile of their residence. The weather was probably warm, and it would seem that the defendants did not nicely consider of the fitness of their apparel. Mr. Deere, who complained, being on bad terms with them, appears to have watched their conduct narrowly. The defendants were shown to be inoffensive, laboring men, of fair moral character. They were, however, convicted and sentenced, each to pay a fine of two hundred dollars, and to stand committed till it should be paid.

The recorder charged the jury, in substance, that the evidence was positive as to the offence charged having been committed; that they were to find if the defendants had committed the offence charged in a manner to openly outrage decency; that as to the intent, the acts showed the intent; and if they were proved that was all that was necessary. That any acts that were injurious to good morals, and openly violated decency, were misdemeanors at common law. There was a general exception to this charge.

It is a general principle of evidence that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. But where an act in itself indifferent becomes criminal if it be done with a particular intent, then the intent must be alleged and proved. The intent in the present case was a material ingredient in the offence, and was a question of fact, under all the circumstances, for the consideration of the jury. It was for them to find whether there had been an intentional, wanton and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner, as to offend against public decency. The charge withdrew this from the consideration of the jury as a question of fact. The jury were told that the evidence was positive as to the offence having been committed, and in effect that if the acts were proved the defendants were guilty. This was erroneous, and as the substance of the charge is open to this objection, we think the defendants may avail themselves of it by a general exception.

The judgment of the general sessions must be reversed, and a *venire de novo* awarded.

State v. Eaton, 3 Harr. 554; *Com. v. Walden*, 3 Cush. 558; *Halrston v. State*, 54 Miss. 689; *Com. v. Merrill*, 14 Gray 415; *Com. v. Hersey*, 2 Allen 173; *Cortland Co. v. Herkimer Co.*, 44 N. Y. 22; *McGehee v. State*, 62 Miss. 772; *State v. Bell*, 29 Ia. 316; *State v. Butman*, 42 N. H. 490; *Maher v. People*, 10 Mich. 212; *Rex v. Knight*, 2 East P. C. 510; *Mullins v. State*, 37 Tex. 337; *Rex v. Boyce*, 1 Moody 29; *Simpson v. State*, 59 Ala. 1; *Roberts v. People*, 19 Mich. 401; *McKay v. State*, 44 Tex. 43; *Clark*, p. 43, 46, 47, 48; *Bishop I.*, Sec. 731-736; *Wharton* 1, 377 *et seq*; *Hawley & McGregor*, p. 36.

(3) *Motive.*

Motive, the ultimate object as distinguished from the intent, the immediate purpose, is never a material element in a crime. The act being forbidden, it is immaterial with what motive it is done.

UNITED STATES *v.* HARMON.

United States District Court, District of Kansas, 1891.

45 Fed. Rep. 414.

THIS is an indictment for depositing an obscene publication in the United States post-office in violation of the provisions of section 3893, Rev. St. U. S. (25 St. p. 496). The prosecution grew out of the following state of facts: The defendant is the editor and publisher of a newspaper at Valley Falls, Kan., entitled "Lucifer, the Light Bearer." It is a paper of singularity. The issue in question is dated "February 14, E. M. 291." It begins its date from 1st of January, 1501, which he calls the beginning of the era of man. Its platform or motto is: "Perfect freedom of thought and action for every individual within the limits of his own personality. Self-government the only true government. Liberty and responsibility the only basis of morality." The paper contains some general news and advertisements, but its specialty is the discussion of sexual relation, and a portrayal of its excesses and abuses. As side-boards to this matter, it teems with homilies and essays on the liberty of individual conscience, and the liberty of speech and of the public press. On

the date above given, which is, according to the common calendar, the 14th of February, 1890, this paper contained an article of over a column, headed, "A Physician's Testimony," purporting to be written by one "Richard V. O'Neill, M. D.," of 330 East Seventieth street, New York. This communication sets out with much particularity various instances falling within his professional experience and practice of abuses of women by their husbands in coercive cohabitation; of family habits of men, boys, and girls, gratifying an unnamable propensity of the father, and the unnatural intercourse between a man and beasts. These acts are described in blunt, coarse terms, too indecent and filthy to be here given *in hæc verba*. The pleader, however, has set the whole article out in exact words in the indictment. At the trial the government and defendant waived a jury, and submitted the case to the court to try both the questions of fact and law. It was admitted that the defendant placed the newspaper containing this publication in the United States post-office for transmission to the party to whom it was directed, knowing that it contained this communication. It was also admitted that the defendant has about 1500 regular subscribers to this paper, embracing heads of families, scattered through the State and elsewhere in the United States. The defendant was permitted to testify as to his motive in publishing such articles, for the purpose of showing, as claimed by his counsel, that he was actuated solely by a purpose to improve the sexual habits, to correct its abuses, and thereby better the human race; and that in all other relations of life he bore a good character as a peaceable, well-conducted citizen. He is a married man, living in wedlock with his second wife, having been divorced from the first. He is now about sixty years of age.

PHILIPS, J. Objection to the Indictment.—Both at the hearing and on the argument of the law and the facts objection was made to the sufficiency of the indictment. The court might, perhaps, with propriety pass upon this objection here, but it is always best that a case should be determined according to well-settled rules of procedure. At common law, objection to the sufficiency of the indictment must be taken prior to trial by motion to quash or demurrer. If not then interposed, it must

come after trial by motion in arrest. 1 Whart. Crim. Law (7th Ed.) Secs. 519, 524, 525. While under the Code of this State the sufficiency of the petition or pleading in civil cases may be raised on the trial by objecting to the introduction of any evidence in support of it, it has been expressly held by the Supreme Court of Missouri, under a similar Code, that this rule of practice has no application to criminal proceedings. *State v. Risley*, 72 Mo. 609.

The Constitutionality of the Act of Congress.—It is next objected that the act of Congress under which this indictment was founded is in contravention of the first amendment of the federal constitution, which declares that "Congress shall make no law * * * abridging the freedom of speech or of the press." Counsel has urged this objection with such force and vigor of reasoning as to entitle it to serious consideration under other conditions than those which exist. The constitutionality of the act in question has been affirmed by the court of last resort in the case of *Ex parte Jackson*, 96 U. S. 727. It is true, the direct question there presented was as to that branch of the statute denying the use of the mails to lottery circulars, etc.; but the opinion of the court proceeds on the theory that the provision of the statute respecting lotteries is so closely allied to that declaring obscene literature non-mailable matter that it must rest upon the same principle, and thereupon proceeds to discuss the latter feature of the statute, and to uphold its constitutionality. Until overruled, this decision must control the action of this court. In view, however, of the fact that the defendant places so much stress along the line of his entire defence on the liberty which should be accorded to the press, it may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish, *ad libitum*, any matter, whatever the substance or language, without accountability to law. Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends. While the genius of our institutions of government accords the largest liberality in the utterance of private opinion, and the widest latitude in polemics,

touching questions of social ethics, political and domestic economy, and the like, it must ever be kept in mind that this invaluable privilege is not paramount to the golden rule of every civilized society, *sic utere tuo ut non alienum lædas*,—"so exercise your own freedom as not to infringe the rights of others or the public peace and safety." 2 Story Const. Sec. 1888. While happily we have outlived the epoch of censors and licensors of the press, to whom the publisher must submit his matter in advance, responsibility yet attaches to him when he transcends the boundary line where he outrages the common sense of decency, or endangers the public safety. As said by that eminent jurist, Judge Story (Id. Secs. 1884-1887:)

"There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the king of England, it could do no wrong, and was free from every inquiry, and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer, with regard to the rights and duties belonging to governments generally or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government. * * * In short, is it contended that the liberty of the press is so much more valuable than all other rights in society that the public safety, nay, the existence of the government itself, is to yield to it? It would be difficult to answer these questions in favor of the liberty of the press without at the same time declaring that such a license belonged and could belong only to a despotism, and was utterly incompatible with the principles of a free government."

In a government of law the law-making power must be recognized as the proper authority to define the boundary line between license and licentiousness, and it must likewise remain the province of the jury—the constitutional triers of the fact—to determine when that boundary line has been crossed.

The Test of Obscenity, etc.—The language of the statute (section 3893, p. 496, 25 St. at Large) is as follows:

“Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing or aiding in the circulation or disposition of the same, shall,” etc.

The statute does not undertake to define the meaning of the terms “obscene,” etc., further than may be implied by the succeeding phrase, “or other publication of an indecent character.” On the well-recognized canon of construction these words are presumed to have been employed by the law-maker in their ordinary acceptance and use. As they cannot be said to have acquired any technical significance as applied to some particular matter, calling, or profession, but are terms of popular use, the court might perhaps with propriety leave their import to the presumed intelligence of the jury. A standard dictionary says that “obscene” means “offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed.” This mere dictionary definition may be extended or amplified by the courts in actual practice, preserving, however, its essential thought, and having always due regard to the popular and proper sense in which the legislature employed the term. Chief Justice Cockburn, in *Rex v. Hicklin*, L. R. 3 Q. B. 360, said: “The test of obscenity is this: Where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall;” and where “it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character.” So, also,

it has been held that a book is obscene "which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency." *U. S. v. Bennett*, 16 Blatchf. 338. Judge Thayer, in *U. S. v. Clarke*, 38 Fed. Rep. 732, observed:

"The word 'obscene' ordinarily means something which is offensive to chastity; something that is foul or filthy, and for that reason is offensive to pure-minded persons. That is the meaning of the word in the concrete; but when used, as in the statute, to describe the character of a book, pamphlet, or paper, it means containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall whose minds are open to such immoral influences."

Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the State reposes? The question was asked with eloquent energy by the learned counsel, commenting on the term "deemed" to be obscene, as employed by Mr. Justice Field in *Ex parte Jackson*, *supra*: Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? Shall every postmaster have the power to deem the matter injurious to the public morals? Shall one postmaster deem a thing injurious and another harmless, and shall the freedom of the press be at the mercy of an indifferent lot of postmasters exercising no responsible discretion? The answer to this is, that asserted violations of

this statute, like other criminal statutes, must be left to the final arbiter under our system of government,—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of twelve are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they mostly nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jury-box, and apply this average judgment to the law and the facts. Sitting as the court does in this case, in the stead of the jury, it may not apply to the facts its own method of analysis or process of reasoning as a judge, but should try to reflect in its findings the common experience, observation, and judgment of the jury of average intelligence. How would the language—the subject-matter—in this article from the pen of “Richard V. O’Neill, M. D.” impress and affect the average man and woman of intelligence and sensibility? What is its probable effect upon society in general? How would such language and matter impress a public assembly of decent men and women? How would it be received in and affect the average family circle of 1500 subscribers to whom the evidence shows this garbage was sent? The subjects discussed and the language employed are too coarse and indecent for the man of average education and refinement to recapitulate. They are so filthy in thought and impure in terms as not to admit of recitation without a shock to the common sense of decency and modesty; and it does seem to me that it is not too much to say that no ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without the risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste. And while it may be conceded to the contention of counsel that the federal government, under its constitutional limitations, ought not to take upon itself the office of *censor morum*, nor undertake to legislate in regulation of the private morals of the people, yet Congress may, as the basis of legislation of this character, have

regard to the common *consensus* of the people that a thing is *malum in se*,—is hurtful to the public morals,—endangering the public welfare, and therefore deny to it as a vehicle of dissemination the use of its post-offices and post-roads, devised and maintained by the government at the public expense for the purpose of promoting the public welfare and common good.

The Criminal Intent.—We are next confronted with the principal contention of the defendant, that the act—the thing done by him—is wanting in the criminal intent which, as he contends, qualifies every criminal offence, especially one rising to the degree of a felony. The argument is that if the offence in question is completed by the mere overt act of knowingly placing in the post-office an obscene print, publication, etc., it would subject to indictment and punishment the judge of this circuit for sending the indictment herein containing the forbidden publication, sent him through the mail by mistake, back to the clerk of the court through the mails, or that such a publication made in a law book as a report of this case would subject the publisher to the penalty of the law for mailing it to his subscribers; that as the overt act of the judge, for instance, can only be exonerated in law by proof of the absence of criminal intent, the rule of exception must be indifferently applied; so that in every case the question of intent, motive, purpose, must be open to inquiry; and if there was no evil design, no *animus mali*, the jury should be directed to acquit. The deduction from this particularization, has for its postulate a radical misconception of the postal organization, and the scope and policy of the law touching obscene literature. The government is authorized, not commanded, by the constitution to maintain post-offices and post-roads. The system is organized and maintained by the government on the public responsibility, solely for the purpose of promoting the public welfare, in facilitating business, commercial, and social intercourse. It is designed to aid legitimate business, and not such as is calculated directly to corrupt the public morals, and sap the foundations of society and government. Having the right to establish or disestablish post-offices and post-roads, just as the public interests may require, Congress may say to what extent the public or any individual may use them, and for what purpose, and may there-

fore limit both the quantity and the quality of the matter sent through the mails. The public officer, like a judge, who commits to the mails an indictment containing the vicious publication in question in the performance of an official duty connected therewith, and in the administration of public justice, is employing the mails within the purview of the object of the constitution. Such a user must, *ex necessitate rei*, be held by the courts to be the exception to the letter of the statute arising from necessary implication, as much so as in the case of the Bolognian law, which enacted "that whoever drew blood in the streets should be punished with the utmost severity." It was held not to apply to the surgeon who opened a vein of a person in order to save his life when he had fallen in the street in a fit. And again, it is obvious from the whole context of the act of Congress in question, as well as the popular history attending its enactment, that it was leveled at the circulation and disposition of the forbidden matter as such in its relation to society. It is to prevent the supposed hurtful effect of the receiving and reading of such indecent literature published as such by declaring it non-mailable, and the statute should be so construed by the courts as to effectuate the legislative intent. "When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view, are to be considered. A thing within the intent of the legislature in framing the statute is sometimes as much within the statute as if it were within the latter. *In re Bomino*, 83 Mo. 441. It is too much to claim that statutes of a highly penal character must universally require proof of the existence of a criminal intent in the violator, in the broad sense of that term. There is a recognized class of offences where the thing done is hurtful, and the probable consequences may be injurious, where "the intention is inferred from doing the act." As said by Blackburn, J., in *Rex v. Hicklin*, *supra*: "If the party does an act which is illegal, it does not make it legal that he did it with some other object." This doctrine was applied in *Reg. v. Dickson*, 3 Maule & S. 11, to the instance where a man gave to children unwholesome bread, but without any intent to harm them; and in *Reg. v. Vantandillo*, 4 Maule & S. 73, where a person carried a child suffering from a con-

tagious disease along a public highway, endangering the health of all passing along, it was held to be a misdemeanor without any allegation or proof that the defendant intended that anybody should catch the disease. In *Com. v. Mash*, 7 Metc. (Mass.) 472, the party was indicted and convicted for bigamy, where the defendant sought to show that her husband had absented himself for a great length of time, and she had remarried under the honest belief that he was dead. Chief Justice Shaw, *inter alia*, said:

"It was urged in the argument that where there is no criminal intent there can be no guilt, and if the former husband was honestly thought to be dead there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he, of course, intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it."

This statute was predicated of the vast importance to society of preventing polygamy. In *Com. v. Emmons*, 98 Mass. 6, the defendant was indicted and convicted for admitting a minor to his billiard room without the written consent of his parents. He sought to acquit himself of the act by showing that the defendant was almost of age, was fully grown, doing business for himself, and that he honestly believed that he was of age. The court says that this evidence is immaterial. "The prohibition of the statute is absolute. The defendant admitted him to his room at his peril, and is liable to the penalty whether he knew him to be a minor or not. The offence is of that class where knowledge or guilty intent is not an essential ingredient in its commission, and need not be proved." And on the same principle it is held by the Supreme Court of Missouri, in *Beckham v. Nacke*, 56 Mo. 546, that a magistrate performing the marriage ceremony of a minor without the consent of his parents was liable to the penalty of the statute, although he acted under a *bona fide* belief that the minor was of full age; the law, as declared by the court, being to prevent the reckless marriage of minors without the consent

of their parents. In *Montross v. State*, 72 Ga. 261, the defendant was indicted and convicted for distributing indecent pictorial newspapers. He undertook on the trial to negative the existence of any criminal intent, by showing that he had simply taken the picture to a police officer for the purpose of testing the validity of the law. The court said:

“Every person is presumed to have intended the natural legal consequences of his conduct, whether that conduct be *malum in se*, as we think this was, or *malum prohibitum*. There is no pretence that this defendant was unapprised of the law under which he is prosecuted.”

It is not a sufficient answer to this class of cases to say, as was suggested on the hearing, that in the case of the law respecting minors, and the like, a party dealing with them, as a universal principle of law, must take notice of the disabilities which attach to their minority. These laws, as in the case of polygamy, are based upon public policy, and the law is arbitrary, and holds the party responsible for the consequences of his act when the means of knowledge are in his reach. It is a part of the common law of the land that indecent exposures, the uttering of obscene words in public, and the like, are indictable offences. It rests upon the universal *consensus* that such things are impure, indecent, and hurtful to the public morals and the common welfare; and, as every man is supposed to know this fact, when he knowingly violates the statute, and gives publicity to such matter, he stands without an excuse in law. The enforcement of the federal revenue laws not inaptly illustrates the proposition that offences endangering the public welfare are made felonies, infamous crimes under the constitution, where the criminal intent does not qualify the act. A retail dealer in spirituous liquors is required to take out a license, not as a prohibitory measure looking to any matter of public morals, but as a means of collecting the revenue essential to the support of the government. The sale of one pint exposes the offender to indictment, fine, and imprisonment at hard labor, if he had not the license, although he may sell it to raise money to buy necessary medicine where human life is in issue, or when he may sell it to a sick man whose restoration de-

mands its ministration. His object in making the sale in no wise acquits him of the offence, however much it may mitigate his punishment by the court. The validity of the law regulating the sale of oleomargarine is upheld by the courts, and although there are people who believe it is wholesome, and the vendor should believe that the public health would be promoted by its use, yet if he knowingly sells it without the requisite license and stamp, notwithstanding the purchaser knows what he is getting, he commits an indictable offence, and incurs the penalty. It is deemed by Congress as a subject of regulation for the public good; and as a means to that end Congress, as a preventive, has imposed most severe penalties, just as it has in the instance of obscene literature.

Reduced to its actual essence, the ultimate position of defendant is this: That although the language employed in the given article may be obscene, as heretofore defined, yet as it was a necessary vehicle to convey to the popular mind the aggravation of the abuses in sexual commerce inveighed against, and the object of the publisher being to correct the evil and thereby alleviate human condition, the author should be deemed a public benefactor, rather than a malefactor. In short, the proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage, and incontinence might run riot; and it is not extravagant to predict that the success of such philosophy would remit us to that barbaric condition where

“No common weal the human tribe allied,
Bound by no law, by no fixed morals tied,
Each snatched the booty which his fortune brought,
And wise in instinct each his welfare sought.”

Guiteau stoutly maintained to the end his sanity, and that he felt he had a patriotic mission to fulfill in taking off President

Garfield, to the salvation of a political party. The Hindu mother cast her babe to the advouring Ganges to appease the gods. But civilized society says both are murderers. The Mormon contends that his religion teaches polygamy; and there is a school of so-called "modern thinkers" who would abolish monogamy, and erect on the ruins the flagrant doctrine of promiscuity, under the disguise of the affinities. All these claim liberty of conscience and thought as the basis of their dogmas, and the *pro bono publico* as the strength of their claim to indulgence. The law against adultery itself would lie dormant if the libertine could get the courts to declare and the jury in obedience thereto to say that if he invaded the sanctuary of conjugal life under the belief that the improvement of the human race demanded it he was not amenable to the statute. Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community; and he consents to all the motto implies, *salus populi suprema est lex*; and, as no government can exist without law, the law-making power, within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself.

Our attention has been called to a newspaper report of an opinion delivered by the Supreme Court of New South Wales in the case of Mrs. Besant for the publication of a pamphlet on "The Law of Population," in which the court held that the defendant was within the pale of legitimate discussion of a subject of vital importance. We have not access to this pamphlet to determine the character of the language employed. We can conceive, and are free to say, that the subject of the increase and the prevention of population might be publicly discussed, as stated in this opinion, "in a decent way," without coming under the ban of obscenity. This opinion states that "it is right to advocate in the abstract the expediency of checking the advancing tide of population; and it appears to me impossible to contend that the thing which tells how this may be done is obscene, if it goes no further than is necessary for this purpose." The scope of this language is to be restrained, presumably, by the facts of the

particular case. If, however, it is to be taken as asserting that the publisher of a promiscuous newspaper may discuss the policy and the means of preventing conception, and that the language deemed essential to convey the meaning of the writer to the popular mind may be employed regardless of its broad vulgarity and obscenity, without legal responsibility, it cannot have my assent. The problem of population, and other questions of social ethics and the sexual relations, may be publicly discussed on such a high plane of philosophy, thought, and fitness of language as to make it legally unexceptional. They may be discussed so as to be plain, yet chaste, so as to be instructive and corrective without being coarse, vulgar, or seductive. But when such publication descends to the low plane of indecent illustrations and grossness of expression as adopted by Dr. O'Neill, it loses all claim to respectability. This article sets forth with a bluntness of speech and a baldness of immodesty of expression instances of bestiality and human depravity not at all germane to the subject of the sexual relations, which is the professed object of the publication of "Lucifer;" and when the defendant and his coadjutors say that such language and subject-matter are only impure to the overprudish it but illustrates how familiarity with obscenity blunts the sensibilities, depraves good taste, and perverts the judgment. To the pure all things are pure, is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. After Adam and Eve ate of the fruit of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and, their eyes being opened, they discerned that there was both good and evil; "and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons." From that day to this civilized man has carried with him the sense of shame,—the feeling that there were some things on which the eye—the mind—should not look; and where men and women become so depraved by the use, or so insensate from perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic.

The defendant has not exhibited in this case a willing and

obedient mind to law, and cannot claim that he has acted unwittingly. After trial and conviction for a similar publication, and while that cause was on appeal, he made this publication, and after arrest, and pending trial herein before the commissioner, he again and again deposited in the post-office the same publication. We recognize his right to have the validity of the law tested; but, pending the litigation, the spirit of good citizenship would have induced forbearance from repeating the alleged offence. Neither is this publication of Dr. O'Neill's defensible or justifiable on the ground that the evils detailed must find their correction through such a medium of discussion as the "Lucifer." They all come under the denunciation of common or statute law; and these declaimers would do more to suppress and prevent their repetition by having such miscreants arrested and prosecuted in the courts than by firing paper words at the acts. Such zeal can never reach martyrdom, for it is without that spirit which challenges admiration and popular intelligent respect. The responsibility for this statute rests upon Congress. The duty of the courts is imperative to enforce it while it stands. My conclusion from the facts and the law is that the defendant is guilty, in manner and form, as charged in the first, third, and fourth counts of the indictment.

Com. v. Has., 122 Mass. 40; State v. White, 64 N. H. 48; Reynolds v. U. S., 98 U. S. 145; Reg. v. Sharpe, 7 Cox. C. C. 214; Reg. v. Hicklin, L. R. 3 Q. B. 360; Guiteau's Case, 10 Fed. Rep. 161; U. S. v. Anthony, 11 Blatch C. C. 200; People v. Cornetti, 92 N. Y. 85; State v. King, 86 N. C. 603; Perdue v. State, 2 Hump. 494; Clark, p. 40; Wharton 1, Sec. 119-121; Hawley & McGregor, p. 25; The Penal Code of Pa.; Shields, vol. I., 391, 418, 421.

-b.

Capacity as Affecting Intent.

A crime can be committed only by one having sufficient *mental capacity* to entertain a criminal intent.

(1) *Infancy.*

Infants under the age of seven are conclusively presumed to be incapable of committing crimes; between the ages of seven and fourteen *prima facie* incapable; above the age of fourteen *prima facie* capable.

THE STATE v. GOIN.

Supreme Court of Tennessee, 1848.

9 Humph. 175.

McKINNEY, J. delivered the opinion of the court.

The defendant was convicted of an assault and battery by the verdict of a jury; but the court refused to render judgment upon the verdict, and discharged the defendant upon the ground that she was only about twelve years of age, being of opinion that a minor, under the age of fourteen was not subject to criminal punishment for misdemeanors, although possessed of sufficient capacity to distinguish between good and evil. In this, it is insisted by the Attorney General, there is error.

There is some confusion and apparent conflict in the books in respect to the liability of an infant to criminal punishment for misdemeanors under the age of twenty-one. And so far as our examination has extended, no very definite or uniform rule seems to have been established. In regard to felonies, it is otherwise. All the authorities concur, that under the age of seven years an infant cannot be punished for any felony committed by him: for the law presumes that in such case a felonious discretion cannot exist, and against this presumption no averment shall be admitted. 1 Hale P., C. 27, 28, 4 Bl. Com. 23. But, on attain-

ing the age of fourteen, the criminal acts of infants are subject to the same construction and punishment as are those of persons of full age, being then presumed to be *doli capaces*, and capable of distinguishing between right and wrong. In the interval between the ages of seven and fourteen years, they are deemed, *prima facie*, *doli incapaces*, and incapable of contracting guilt. If, however, it clearly appear that they were *doli capaces*, and could discriminate between good and evil, they may be convicted and punished. The maxim in such cases is, *malitia supplet ætatem*; but the evidence of malice which is to supply age, must be clear beyond all contradiction. Such are the well established principles in regard to infants charged with the commission of felonies. In treating of the capacity of infants to commit crimes, Blackstone, 4 Com. 22, says: "The law of England does, in some cases, privilege an infant under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But, where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit), for these an infant above the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one." This authority, however, does not assert—nor do any of the authorities to which we have had access—that an infant under the age of fourteen, if possessed of sufficient capacity to discern good from evil, may not be punished in such cases; and we apprehend the author did not intend to be so understood. The position laid down, as far as it goes, is unquestionably correct, that infants above the age of fourteen are equally as liable as persons of full age to conviction and punishment in cases of misdemeanors involving violence and breaches of the peace; and so in cases of felony. But, this authority does not establish the conclusion attempted to be deduced from it, that, under the age of fourteen, an infant, regardless of his capacity to commit crime, shall be exempt from punishment. It would seem grossly absurd to hold that an infant under the age of fourteen, if possessed of sufficient capacity, may be convicted and punished, even with

death, but that in cases of breach of the peace, or violent injuries to the person of another, he shall be permitted to escape, though possessed of like capacity. Such distinction is inconsistent with reason; it is also in opposition to an admitted axiom of the law, that the higher the grade of the offence, the stronger should be the proof, not merely of the *corpus delicti*, but also of the capacity of the offender; and it is no less opposed to one of the chief ends of criminal jurisprudence, the preservation of the public peace and security of the persons of the citizens. In Dane's Abr. vol. 6, 638, it is laid down, in accordance with what we understand to be the law, that, "for a breach of the peace, a riot, battery, etc., a minor above fourteen years may be punished; under seven years of age an infant cannot be guilty; but between seven and fourteen years of age, the capacity only is regarded; hence, one eight years of age may be guilty, and punished." See also Roscoe's Cr. Ev., 872.

The proof in this record shows, that the defendant had sufficient capacity to commit crime; and that the battery was prompted by malice and revenge, and committed upon an infant incapable of self-defence; and, being of opinion that the conviction was proper, we hold that the Circuit Court erred in refusing to pronounce judgment and in discharging the defendant. The judgment will, therefore, be reversed, and judgment will be here rendered upon the verdict.

Willet v. Com., 13 Bush. 230; State v. Tice, 90 Mo. 112; Angelo v. People, 96 Ill. 209; People v. Townsend, 3 Hill (N. Y.) 479; State v. Guild, 10 N. J. L. 163; State v. Barton, 71 Mo. 288; State v. Adams, 76 Mo. 355; Com. v. Mead, 10 Allen 396 & 398; State v. Learnard, 41 Vt. 585; State v. Nickleson, 14 So. 134; Keith v. State, 26 S. W. 412; State v. Milholland, 56 N. W. 403; Godfrey v. State, 31 Ala. 323; State v. Doherty, 2 Overton 80; State v. Bostwick, 4 Harr. 563; Irby v. Georgia, 32 Ga. 496; Clark, p. 49; Bishop 1, Sec. 367 *et seq*; Wharton, 67 *et seq*; Hawley & McGregor, p. 7.

NOTE.—The above ages are changed by statute in some of the States. Minn. Stat. 1894, Sec. 6300, 6301; Clark, p. 49; New York Penal Code, Sec. 18, 19.

NOTE.—At common law a minor under the age of fourteen is conclusively presumed incapable of committing rape.

Reg. v. Phillips, 8 Car & P. 736; State v. Handy, 4 Harr 566; Reg. v. Jordan, 9 C. & P. 118; Clark, p. 51, 191; Bishop I., Sec. 373; Wharton, Sec. 69; Hawley & McGregor, p. 170.

NOTE.—In some States this presumption is disputable.

Williams v. State, 14 Ohio 222; *People v. Randolph*, 2 Park C. C. 174; *Gordon v. State*, 21 S. E. 54; *Com. v. Green*, 2 Pick. 380; *State v. Pugh*, 7 Jones (N. C.) 61; *O'Meara v. State*, 17 Ohio St. 521; *State v. Jones*, 39 La. Ann. 935; *Heilman v. Com.*, 84 Ky. 457; N. Y. Penal Code, Sec. 279; *Clark*, p. 191; *Bishop I.*, Sec. 373; *Bishop II.*, Sec. 1117; *Hawley & McGregor*, p. 170.

(2) *Insanity.*

Insanity in law is a weak or diseased condition of mind rendering it incapable of entertaining a criminal intent.

Persons insane in law cannot be tried, sentenced or punished for any criminal act.

(a) Tests.

(1¹) Right and Wrong.

The "right and wrong" test is applied by a majority of the courts. A person is legally insane when he cannot distinguish between right and wrong as to a particular act at the time he performs it.

FLANAGAN *v.* THE PEOPLE.

Court of Appeals of the State of New York, 1873.

52 N. Y. 467.

THE plaintiff in error was indicted for murder in the first degree in killing his wife. The defence interposed was insanity.

ANDREWS, J. The judge, among other things, charged the jury that, "to establish a defence on the ground of insanity, it must be clearly proven that, at the time of committing the act (the subject of the indictment), the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; and, if he did know it, that he did not know he was doing wrong;" and to this part of the charge the prisoner, by his counsel, excepted.

The part of the charge excepted to was in the language employed by Tindal, C. J., in *McNaughton's Case* (10 Clarke & Fin., 210), in the response of the English judges to the questions put to them by the House of Lords as to what instructions should be given to the jury, on a trial of a prisoner charged with crime, when the insane delusion of the prisoner, at the time of the commission of the alleged act, was interposed as a defence.

All the judges, except one, concurred in the opinion of Tindal, C. J., and the case is of the highest authority; and the rule declared in it has been adhered to by the English courts.

MAULE, J., gave a separate opinion, in which he declared that, to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law, as it has long been understood and held, be such as to render him incapable of knowing right from wrong.

In the case of *The People v. Bodine* (4 Denio, 9) the language of Tindal, C. J., in the *McNaughton Case*, was quoted and approved; and Beardsley, J., said: "Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act was done."

The rule was reaffirmed in the case of *Willis v. The People* (32 N. Y., 717), and it must be regarded as the settled law of this State, that the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defence, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of the inquiry.

We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter.

The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is

unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid.

Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law.

The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it.

Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Rolfe, B., in *Rogers v. Allunt*, where, on the trial of an indictment for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: "Every crime was committed under an influence of such a description; and the object of the law was to compel people to control these influences."

The judge intended, by the proposition excepted to, as is apparent from the other parts of the charge, merely to instruct the jury as to the character and extent of mental unsoundness which, if proved, would shield from criminal responsibility; and it must have been so understood by the jury and by counsel; and to the rule thus propounded by the judge the exception was pointed. What was said as to the measure of proof of insanity was incidental and collateral to the main proposition; and if an inadvertent error in phraseology crept in, it did not mislead, and was not excepted to.

In *People v. McCann* (16 N. Y., 58) it was held that it was error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt to entitle him to an acquittal. This was the extent of the decision. The question was not in the case, whether the prisoner would be entitled to the benefit of a doubt upon the evidence introduced by him to establish the defence. What is said by the learned judges upon that subject is entitled to such weight as their char-

acter and learning and their arguments entitle it to. (See *People v. Schryver*, 42 N. Y., 1.)

It is not necessary for us to consider the question in this case; but we prefer to leave it precisely where the cases cited leave it, an open question, so far as judicial authority in this State is concerned.

The exception considered is the only one presented or argued by counsel, and we are of the opinion that the judgment should be affirmed.

All concur; Rapallo, J., in result.

Judgment affirmed.

Hornish v. State, 142 Ill. 620; *McNaughten's Case*, 10 Clark & F. 200; *Dunn v. People*, 109 Ill. 635; *Blackburn v. State*, 23 Ohio State 146; *Spann v. State*, 47 Ga. 553; *State v. Shippey*, 10 Minn. 223; *State v. Gut*, 13 Minn. 315; *State v. Wells*, 54 Kan. 161; *People v. Pine*, 2 Barb. 566; *People v. O'Connell*, 62 How. Pr. 436; *Reg. v. Barton*, 3 Cox. C. C. 275; *Reg. v. Stokes*, 3 C. & K. 185; *Clark*, p. 52; *Bishop I.*, Sec. 386; *Wharton*, Sec. 34; *Hawley & McGregor*, p. 9.

Arnold's Case, 16 State Trials 695; *Regina v. Higginson*, 1 C. & K. 129; *People v. Hobson*, 17 Cal. 424; *Willis v. People*, 5 Park 621; *State v. Haywood*, Phillips Law 376; *State v. Thompson*, Wright (Ohio) 617; *State v. Redemeier*, 8 Mo. App. 1; *Erwin v. State*, 10 Tex. App. 700; *Willcox v. State*, 28 S. W. 312; *People v. Leary*, 39 Pac. 24, 105 Cal. 486; *State v. Brandon*, 8 Jones (N. C.) 463; *Stevens v. State*, 31 Ind. 485; *Bradley v. State*, 31 Ind. 492; *Fouts v. State*, 4 Greene (Ia.) 500; *Roberts v. State*, 3 Ga. 310; *Minn. State*, 1894, Sec. 6303; N. Y. Penal Code, Sec. 20, 21; The Penal Code of Pa.; *Shields*, vol. II., 922-925. *Contra.*—*Clark v. State*, 12 Ohio 483; *Reg. v. Burton*, 3 F. & F. 772.

(2¹) Irresistible Impulse.

Some courts recognize the "irresistible impulse test." A person is legally insane, though he can distinguish right from wrong, when, by reason of weakness or disease of mind, he is under the control of an impulse so irresistible as to destroy his free agency. But such an impulse is deemed irresistible only when the person is otherwise insane.

STATE *v.* FELTER.

Supreme Court of Iowa, 1868.

25 Ia. 67.

THE defendant was indicted for the murder of his wife, pleaded not guilty, was tried, found guilty of murder in the second degree and sentenced to imprisonment in the penitentiary of the State for life. From this judgment he appeals to this court.

The court charged the jury that "if the defendant, at the time of the commission of the act (if he did commit it), was laboring under such a degree of insanity as irresistibly and uncontrollably forced him to commit the act, and if he did not at the time of the act, have reason sufficient to discriminate between right and wrong in reference to the act about to be committed by him, it is your duty to acquit wholly; in other words, if you believe from the evidence that the defendant's mind, at the time of committing the act (if he did commit it), was so insane that he did not know the nature of the crime, and did not know that he was doing wrong in doing the act, it is your duty to acquit him altogether."

The defendant's counsel complain of this instruction, and in their written argument make to it this objection: "The court did not state the law; only a part of it. It told the jury if the defendant had sufficient mind to discriminate between right and wrong he was responsible. This is not sufficient. He must have mind enough to know that he will be held responsible for his act."

The specified objection to this instruction does not call upon us to enter at length on an examination of the subject of insanity as a defence to alleged criminal acts. The instructions as given are substantially as the defendant's counsel in their argument claim they should have been, and are not, as we find upon comparison, essentially different on this point from those asked to be given on the part of the defendant.

With reference to the right and wrong test referred to in the instructions given, it will be seen that the court does not adopt this criterion as a general one, that is the court does not say if the defendant has capacity to distinguish between right and wrong generally, he is criminally responsible.

But it held that if at the time and with respect to the act about to be committed, the defendant had not reason enough to discriminate between right and wrong with reference to that act, had not reason enough to know the nature of the crime, and did not know that he was doing wrong in committing it, he is not criminally punishable. The court in substance held that if the defendant's reason was so far gone or overwhelmed that his perception of right or wrong with respect to the contemplated act was destroyed, if he did not rationally comprehend the character of the act he was about to commit, he should be acquitted.

The instruction as given finds a full support in the judgments of courts the most respectable. *Freeman v. The People*, 4 Denio, 27; and approved and followed in the recent case of *Willis v. The People*, 32 N. Y., 715; *The State v. Brandon*, 8 Jones (N. C. Law), 463; *Mosler v. Commonwealth*, 4 Barr. 266; *McNaughton's Case*, 10 Cl. & F. 210; *Oxford's Case*, 9 C. & P. 525.

On the other hand, the right and wrong test, even when guarded as carefully as in the court's instruction, has been very vehemently opposed as incorrect and delusive (*Ray*, Secs. 16, 17, 18, 19, *et seq.*; *Wharton & Stille* [2d ed.] Sec. 59; and see *Smith v. Commonwealth*, 6 Duvall [Ky.] 224), especially as a criterion of responsibility in cases of moral insanity.

As applied to the facts of this case, a preferable mode of instructing the jury will be briefly indicated below.

In my opinion, the right and wrong test is not to be applied too strictly, and belongs more properly to intellectual than to moral insanity. Intelligent medical observers who have made in-

sanity a special study, insist that it not unfrequently happens that persons undoubtedly insane, and who are confined on that account in asylums, are able to distinguish right from wrong, and to know the moral qualities of acts.

Perhaps the profession of law has not fully kept pace with that of medicine on the subject of insanity. And yet medical theorists have propounded doctrines respecting insanity as an excuse for criminal acts, which a due regard for the safety of community and an enlightened public policy must prevent jurists from adopting as part of the law of the land.

If, as the court charged, the defendant committed the act from an irresistible and uncontrollable insane impulse, not knowing it was wrong, it is clear that he is not criminally responsible.

But suppose he knew it was wrong, but yet was driven to it by an uncontrollable and irresistible impulse, arising, not from natural passion, but from an insane condition of the mind, would he then be criminally responsible?

Most of the cases before cited have recognized the doctrine, that there is a responsibility for the criminal act if the accused knew at the time it was wrong; or, as it would be better expressed, if he rationally comprehended the character and consequences of the act.

But, if, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind,—that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it,—the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect.

It is not too much to say, that both medicine and law now recognize the existence of such a mental disease as homicidal insanity; the remaining question in jurisprudence being what must be shown to make it available as a defence to a charge of murder. See Wharton & Stille's *Med. Juris.* Secs. 61, 178.

In a recent case in Kentucky, it is said that moral insanity is recognized by medico-jurists, and that "the true test of responsi-

bility is, whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions." *Smith v. Commonwealth*, 1 Duval (Ky.) 224; see also *Scott v. Commonwealth*, 4 Metc. (Ky.) 227; compare *State v. Brandon*, *supra*.

If this want of power of control arose from the insane condition of the mind of the accused, he should not be held responsible. But if want of power to control his actions arose from violent and ungovernable passions, in a mind not diseased or unsound, he would and ought to be criminally punishable for his acts.

Of all medico-legal questions, those connected with insanity are the most difficult and perplexing.

Without further discussion, we conclude by stating what, under the facts of this case, would be safe and proper directions to be given to the jury respecting the point under consideration. The jury, in substance, should be told that if the defendant's act in taking the life of his wife (if he did take it), was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment. But if the jury believe from all the evidence and circumstances, that the defendant was in the possession of a rational intellect or sound mind, and allowed his passions to escape control, then, though passion may for the time being have driven reason from her seat and usurped it, and have urged the defendant with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.

Whether passion or insanity was the ruling force and controlling agency which led to the homicide,—in other words, whether the defendant's act was the insane act of an unsound mind, or the outburst of violent, reckless and uncontrolled passion in a mind not diseased,—is the practical question which the jury should be told to determine according to their best judgment upon the evidence before them. If they believe that the homicide was the direct result or offspring of insanity, they should acquit; if of passion, unless it be an insane passion, they

should convict. This is a much more practical inquiry than to direct their attention solely to the defendant's capacity at the time to distinguish right from wrong—an inquiry which must often be speculative and difficult of determination from the data possible to be laid before the jury, and which as a test or criterion of responsibility rather belongs, when applicable, to what is known as intellectual, as distinguished from moral insanity.

As the case will have to be retried, we have briefly indicated our general views as to the instructions proper to be given to the jury on the subject of criminal capacity and responsibility. Where homicidal insanity is relied on, the court may very properly say to the jury that they should indulge in no prejudice against the defence, but give it thoughtful, thorough, dispassionate consideration; yet that the interest of society requires that it ought not to be regarded as sufficient to exculpate unless the jury believe from the evidence that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will and render it impossible for the accused to do otherwise than to yield to the insane impulse. In other words, it should appear not only that the mind of the accused was insane, but that the act for which he is indicted was the direct offspring of such insanity; this being shown, responsibility is annulled, but not otherwise. Because of the error of the court in excluding material portions of the affidavit for a continuance, the judgment is reversed, and the cause remanded for a new trial.

Reversed.

State v. Reidell, 9 Houst. 470; *Parsons v. State*, 81 Ala. 577; *Smith v. Com.*, 1 Duvall (Ky.) 224; *Harris v. State*, 18 Tex. App. 287; *Looney v. State*, 10 Tex. App. 520; *State v. Jones*, 50 N. H. 369; Wharton's note, *Guiteau Case*, 10 Fed. Rep. 189; *State v. Windsor*, 5 Harr. (Del.) 512; *Com. v. Rogers*, 7 Met. (Mass.) 500; *Dejarnette v. Com.* 75 Va. 867; *Reg. v. Oxford*, 9 Car. & P. 525, 546; *State v. Coleman*, 27 La. Ann. 691; *Stevens v. State*, 31 Ind. 485; *Blackburn v. State*, 23 Ohio St. 146; *Freeman v. People*, 4 Denio 9; *Willis v. People*, 32 N. Y. 715; *Meyer v. People*, 156 Ill. 126; *Clark*, p. 55; *Bishop* 1, Sec. 387, 388; Wharton, Sec. 43; *Hawley & McGregor*, p. 10.

Hopps v. People, 31 Ill. 385; *Wright v. People*, 4 Neb. 407; *Com. v. Mosler*, 4 Pa. St. 264; *Ortwein v. Com.*, 76 Pa. 414; *State v. Johnson*, 40 Conn. 136; *Cunningham v. State*, 56 Miss. 268; *Lynch v. Com.* 77 Pa. 205; *People v. Sprague*, 2 Park Cr. Cas. 43. *Contra.*—*State v. Thomas*, 15 So. 237.

(3¹) Emotional insanity, a phase of irresistible impulse, driving one, by reason of sudden passion, to the commission of crime, is not recognized by the courts as a ground of irresponsibility.

State v. Geddis, 42 Ia. 264; *Willis v. People*, 5 Parker 621; *Cole's Trial*, 7 Abb. Pr. N. S. 321; *Reg. v. Haynes*, 1 F. & F. 666; *Buswell on Insanity*, Sec. 442; 7 Alb. Law Jour. 273; *Clark*, p. 57; *Bishop I.*, Sec. 387; *Wharton*, Sec. 43.

(4¹) Moral insanity, a perverted condition of the moral sense, whereby one lives under a mania to commit certain crime, has found recognition in some few tribunals. This is a dangerous doctrine and not generally accepted.

State v. Reidell, 9 Houst. 470; *Com. v. Mosler*, 4 Pa. St. 264; *Coyle v. Com.*, 100 Pa. 573; *Sanchez v. People*, 4 Park 535; *Taylor v. Com.*, 109 Pa. 262; *Harris v. State*, 18 Tex. App. 287; *Looney v. State*, 10 Tex. App. 520; N. Y. Penal Code, Sec. 23; *Clark*, p. 57; *Bishop I.*, 387; *Wharton*, Sec. 46.

(b) Proof of Insanity.

Burden of Proof.

The law presumes all men sane. The accused must in most jurisdictions prove insanity by a fair preponderance of evidence. To raise a reasonable doubt on the question of sanity is not sufficient.

COMMONWEALTH v. GERADE.

Supreme Court of Pennsylvania, 1891.

145 Pa. St. 289; 22 Atl. 464.

DEFENDANT was indicted, charged with the murder of Annie Hofer.

At the close of the case on the testimony, the court, Magee, J., charged the jury in part as follows:

I will now take up the points presented by counsel for defendant, and answer them. You will find that the court, in the preparation of its charge, has anticipated, to some degree at least, the

points presented as the subject of its consideration. The defendant, by his counsel, asks the court to charge the jury as follows:

1. That the burden of proof never shifts from the commonwealth to the defendant; and the commonwealth must show, beyond a reasonable doubt, that the defendant was of sound mind, memory and discretion at the time of the killing.

Answer: This point is refused. As I understand the point, it is intended to say that the defence of insanity shall be established beyond a reasonable doubt; that unless it is established beyond a reasonable doubt, it would be your duty to acquit. I do not understand the law to go to that extent, and the matter will be referred to in my general charge, wherein the law, as I understand it, is correctly stated on this subject.

2. That if, at any stage of the trial, by the evidence a reasonable doubt of this condition of the defendant arises, it is the duty of the jury to acquit.

Answer: This point is refused. Substantially it is the same point; that is, if insanity is the ground of defence you must be satisfied beyond a reasonable doubt of its existence; that is not, as I said in reference to the first point, the law as I understand it.

3. If the jury be satisfied by the evidence that at the time of the killing the defendant was insane, that he was under the control of a resistless, homicidal impulse that led to the commission of the act, then their verdict should be, "By reason of insanity, not guilty."

Answer: As counsel for defendant have already informed me that this point is intended to involve the same question as the two preceding points, it is refused for the reasons given above.

4. That if, on any material matter involved in the issue, the jury entertains a doubt, they should acquit.

Answer: This point is affirmed, and we refer you to the subject in our general charge of what a reasonable doubt is, and to what it is applicable.

5. That one of the essential characteristics of murder being that defendant, at the time of killing, was of sound memory and discretion, if the jury has any reasonable doubt of this fact they ought to acquit.

Answer: This point is refused, as it embodies the same prin-

ciple that is suggested in the first point, that is, that insanity has to be established beyond a reasonable doubt, whereas the law, as I understand it, is, that that being a defence, you are only required to determine that question of insanity by a preponderance of testimony.

6. That under the plea of not guilty, the defendant has the right to show, by way of defence, the insanity of the defendant at the time of the killing, and that the jury must pass upon the question of defendant's sanity, or insanity, and if they find him insane at the time of the killing, acquit by reason of insanity.

Answer: This point is affirmed.

I have now answered the points presented by the counsel for the defendant, and now proceed with my general charge.

The indictment which has been read in your hearing, and upon which the issue is joined, charges that Annie Hofer was murdered by the defendant, and contains another count for manslaughter. Under the indictment upon which this issue is joined, the prisoner at the bar may be acquitted of all crime; he may be convicted of voluntary manslaughter; he may be convicted of murder of the second degree, or he may be convicted of murder of the first degree. So that it becomes necessary for the court to instruct you fully as to the law respecting the degrees of murder, as to the law of voluntary manslaughter, and as to the law of insanity, and this we will proceed to do. * * *

The plea of insanity is a defence set up in this case. Whenever idiocy, or dementia, or general mania is shown to exist, the prisoner must be acquitted; and it is enough if it be shown to have existed in reference to the particular act. At one time it was said that it had to be general insanity, applied to everything, insane on everything, but it was afterwards modified, in that it is sufficient to be insane on the particular act that is charged as criminal. It is my duty to say to you, as the law governing the question of the responsibility of men for their acts, that, in all cases, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury; and, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature of the act he was doing, or if he did know

it, that he did not know he was doing what was wrong. That looks like a fair definition of what insanity is. That is what is required to relieve him of responsibility for his acts. * * *

—October 1, 1890, the jury returned a verdict finding the defendant guilty of murder of the first degree. On November 8th, a rule for a new trial being overruled, judgment was passed, when the defendant took this appeal, assigning for error, the refusal of the foregoing offers of the defendant.

OPINION, MR. JUSTICE STERRETT:

As stated in appellant's history of the case, "the defence upon which his counsel chiefly relied was insanity." In view of that fact, several points for charge, bearing more or less directly on the subject, were submitted. One of these is "that under the plea of not guilty, the defendant has a right to show, by way of defence, the insanity of the defendant at the time of the killing, and that the jury must pass upon the question of the defendant's sanity or insanity, and if they find him insane at the time of the killing, acquit him by reason of insanity." This point was rightly affirmed without any qualification, and, of course, it is not assigned for error. Other points recited in the thirteenth, fourteenth, fifteenth and seventeenth specifications, respectively, were answered in the negative, and therein it is alleged there was error. In the first of these, the court was requested to charge: "That the burden of proof never shifts from the commonwealth to the defendant, and the commonwealth must show, beyond a reasonable doubt, that defendant was of sound mind, memory, and discretion at the time of the killing." The learned judge's answer was: "This point is refused. As I understand the point, it is intended to say that the defence of insanity shall be established beyond a reasonable doubt; that, unless it is established beyond a reasonable doubt, it would be your duty to acquit. I do not understand the law to go to that extent, and the matter will be referred to in my general charge, wherein the law, as I understand it, is correctly stated on this subject." If this answer was intended to be responsive to the point, its meaning is not very clear. The court was not requested to charge "that the defence of insanity shall be established beyond a reasonable doubt." On the contrary, the last clause of the point is, in sub-

stance, that the burden of proving, affirmatively and beyond a reasonable doubt, the sanity of the defendant at the time of the killing, was on the commonwealth. But, whatever impression this and other answers to the defendant's points may have made on the minds of the jury, it may be safely assumed that, in considering the evidence bearing on the defence of insanity, they were governed by what the learned judge afterwards said in that portion of his general charge to which they were specially referred for a correct statement of the law on the subject. After speaking particularly of insanity as a defence, etc., he there said, *inter alia*: "It is my duty to say to you, as the law governing the responsibility of men for their acts, that, in all cases, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury; and, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. This looks like a fair definition of what insanity is. That is what is required to relieve him of responsibility for his acts."

Without questioning the general correctness of what was said, in that connection, as to the kind of insanity that constitutes a defence to an act, which would otherwise be punishable as criminal, we think the degree of proof necessary to sustain such a defence was too strongly stated in saying "it must be clearly proved." This was imposing on the defendant a greater burden than the law requires.

In harmony with the humane principle of the criminal law, that every person accused of crime shall be presumed innocent until his guilt is clearly established, it is incumbent on the commonwealth to prove, not only to the satisfaction of the jury but beyond a reasonable doubt, the presence of every ingredient necessary to constitute the crime charged in the indictment. That burden, as was said in *Turner v. Commonwealth*, 86 Pa. 54, never shifts, but rests on the prosecution throughout; so that, in all cases, a conviction can be had only after the jury has been convinced, beyond a reasonable doubt, of the defendant's guilt.

It necessarily follows that, if the evidence is such as to leave a reasonable doubt in the minds of the jury as to the existence of any necessary ingredient of the crime charged, they should give the defendant the benefit of that doubt. But presumptions of fact sometimes stand for full and express proof until the contrary is shown. For example, inasmuch as sanity is the normal condition of man, every one is presumed to be sane, and that presumption holds good, and is the full equivalent of express proof, until it is successfully rebutted. When insanity of the defendant is set up as a defence, it is incumbent on him to rebut the ordinary presumption of sanity, and show, not beyond a reasonable doubt, nor either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a fact in civil issues, that he was insane at the time of committing the alleged crime. In *Lynch v. Commonwealth*, 77 Pa. 205, 213, the trial judge refused to charge "that, if the jury have a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict;" and, for further answer to the point, said: "The law of this State is that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act; a mere doubt as to such insanity will not justify the jury in acquitting on that ground." That instruction was approved by this court, and substantially the same instruction was afterwards sanctioned in *Ortwein v. Commonwealth*, 76 Pa. 421, 425, and other cases. In *Coyle v. Commonwealth*, 100 Pa. 573, the same rule of evidence was again recognized. It was further held to be error, in that case, to instruct the jury that the defence of insanity should be proved by clearly preponderating evidence. The instruction should have been "fairly preponderating," instead of "clearly preponderating evidence." Speaking of the degree of proof required by the words employed in that case, Mr. Justice Mercur, said: "It is demanding a higher degree of proof than the authorities require. It may be satisfactorily proved by evidence which fairly preponderates. To require it to clearly preponderate, is practically saying it must be proved beyond all doubt or uncertainty. Nothing less than this will make it clear to the jury."

As applied to the degree of proof required to rebut the presumption of sanity, and sufficiently prove the existence of insanity, there is no appreciable difference between the expressions "clearly proved" and "proved by clearly preponderating evidence." If there is any difference, the former calls for the higher degree of proof. It is almost equivalent to saying "proved beyond a reasonable doubt;" because, if any doubt as to the existence of a particular fact exists, it cannot be said to be "clearly proved."

It is true that the learned judge, in another part of his somewhat lengthy charge, said to the jury: "You have to be satisfied of his insanity by the preponderance of the evidence. He has to establish, in other words, his insanity, not by the rule of a reasonable doubt, but by the testimony, what the preponderance of the evidence shows." But, with two measures of proof before them, one substantially correct and the other erroneous, how is it possible for us to determine which the jury adopted? There should be nothing left to conjecture, especially in a capital case. It is enough to know that the jury may have been misled by erroneous instructions on a point vital to the defence.

The testimony referred to in the sixth, eighth, ninth and tenth specifications appears to have been neither incompetent nor irrelevant, and we think it should have been admitted. Neither of the remaining specifications of error requires special notice. That part of the charge embraced in the eighteenth specification of error contains some expressions of opinion, etc., that might have been profitably omitted, but we are not prepared to say that they are positively erroneous.

Judgment reversed, and a *venire facias de novo* awarded.

State v. Reidell, 9 Houst. 470; Com. v. Woodley, 166 Pa. St. 463; Bonfanti v. State, 2 Minn. 123; State v. Nixon, 32 Kan. 205; State v. Clements, 17 So. 502; People v. Ward, 38 P. 945, 105 Cal. 335; State v. Crawford, 14 Am. L. Reg. 21 and note; State v. Mowry, 37 Kan. 369, 375; Pannell v. Com., 86 Pa. 260; Meyers v. Com., 83 Pa. St. 131; Brown v. Com., 78 Pa. St. 122; Ortwein v. Com., 76 Pa. St. 421; Lynch v. Com., 77 Pa. St. 205; People v. Myers, 20 Cal. 518; People v. Coffman, 24 Cal. 231; People v. Messersmith, 61 Cal. 246; People v. Travers, 88 Cal. 233; People v. McNulty, 93 Cal. 427; Clark, p. 58; Wharton, Sec. 60; Hawley & McGregor, p. 15.

(3) *Intoxication.*

Voluntary drunkenness is no defence to a criminal act committed while in that condition.

FLANIGAN *v.* THE PEOPLE.

Court of Appeals of the State of New York, 1881.

86 N. Y. 554.

ERROR to the General Term of the Superior Court of the city of Buffalo, to review judgment entered upon an order made July 23, 1881, which affirmed a judgment of a criminal term of said court, entered upon a verdict convicting the plaintiff in error of the crime of murder in the first degree.

The plaintiff in error was indicted for the murder of one John Karins. It appeared by the evidence that the deceased kept a boarding-house for laborers upon a railroad, and also was foreman or boss. The prisoner boarded with Karins, and had formerly been at work under him, but about three months before the murder Karins caused him to be discharged. The prisoner went to Karins' room about 10 or 11 P. M., and stabbed him while he was asleep. The prisoner was in the habit of drinking to excess and was frequently intoxicated; he had been drinking heavily on the day of the murder.

The prisoner's counsel, among other things, requested the court to charge "that from all the evidence in the case the jury may believe, if they see fit, that the prisoner may have been the victim of an appetite for drink entirely overcoming his will and amounting to a disease; and if they do so believe they must acquit the prisoner, unless they believe, beyond a reasonable doubt, that the act was not committed while his mind was overwhelmed by the effects of the liquor so taken."

The court refused so to charge, and said counsel duly excepted.

Said counsel also requested the court to charge "that the jury may take into consideration the question of drunkenness as af-

fecting each of the facts of deliberation or premeditation." The court declined to so charge and an exception was duly taken.

Said counsel also asked the court to charge "that the jury may take into consideration the question of drunkenness as affecting the fact of deliberation."

To this the court replied, "I have charged that, I think; I leave that to the jury, as to the two degrees of murder, and whether there was deliberation or not."

The court did charge at the request of said counsel "that from all the evidence in the case the jury may believe that the act of which the prisoner is charged may have been done in a moment of drunken frenzy; and that if they do so believe, they cannot predicate deliberation or premeditation of the act, and, therefore, cannot find the prisoner guilty of more than manslaughter in one of its degrees."

Said counsel also requested the court to charge that "if the jury believe that the prisoner was under the influence of liquor, or drunk, at the time of the commission of this act, they may take into consideration his drunkenness as to whether it does not render more weighty the presumption of his having yielded to sudden passion, rather than to previous malice."

To this the court replied, "I will charge that the jury may look at that consideration."

MILLER, J. It is claimed that the judge erred upon the trial in refusing to charge, as requested by the prisoner's counsel, "that, from all the evidence in the case, the jury may believe, if they see fit, that the prisoner may have been the victim of an appetite for drink, entirely overcoming his will and amounting to a disease; and that, if they so believe, they must acquit the prisoner, unless they believe, beyond a reasonable doubt, that the act was not committed while his mind was overwhelmed by the effects of the liquor so taken." The proposition contained in this request was to the effect that the jury were authorized to believe that the prisoner was the subject of an appetite for intoxicating drinks, which entirely controlled his will, and to the extent of becoming a disease, and that he was not responsible unless the crime was committed while he was not under the influence of such disease.

The effect of this proposition would be to excuse the prisoner from the consequences of the crime committed, if he was laboring under intoxication so that his will was overcome, and not under his control at the time; in other words, that drunkenness, if carried to the extent of producing incapacity to control the action of the mind and will of the prisoner, would be an excuse for the crime committed.

The rule is well settled that voluntary intoxication of one who, without provocation, commits a homicide, although amounting to a frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences, upon the question of intent, as affecting the grade of his crime, which are applicable to a person entirely sober. (*People v. Rogers*, 18 N. Y. 9.)

Within the rule laid down in the case cited, we think that the request to charge cannot be sustained. The position of the learned counsel for the prisoner is, that he had a right to go to the jury upon the question whether intoxication was a disease, as described in the request, and whether the prisoner was afflicted with it, and, if the jury found both of these facts, the drunkenness could not have been voluntary, and, if the jury believed the mind was overwhelmed by means thereof, that the prisoner must be excused as an insane man. It may be answered that no such distinct request was made; but aside from this, the position taken would be adverse to the principle which has been established by a long series of decisions, and, if enforced, might lead to exonerate offenders for crimes committed by them when under the influence of intoxicating drinks, and thus furnish an excuse for the commission of the most heinous offences. The authorities all agree upon the proposition that mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime, and, to sustain the doctrine asserted, it would be necessary to overrule this well-established principle. The proposition contained in the request was also objectionable, as it assumed that, if the prisoner had become the victim of an appetite for strong drinks so as to overcome his will, and amounting to a disease, even although he was able to distinguish between right and wrong at the time of, and with respect to, the act committed, he should be acquitted. (*Flanagan v. The People*, 52 N. Y. 467.)

The finding of the jury that the prisoner was affected with the alleged disease would not exonerate him from responsibility for the crime, and his intoxication did not authorize the court to charge as requested.

No error was, therefore, committed in the refusal of the judge to grant the request, nor was there any error in the refusal of the judge to charge, as requested, that the jury might "take into consideration the fact of drunkenness, as affecting each of the questions of deliberation and premeditation."

The question presented by this request has been the subject of consideration in the reported decisions in the courts of this State. In *The People v. Rogers* (*supra*), a request was made by the prisoner's counsel to charge the jury to the effect that drunkenness might exist to such a degree that neither an intention to murder nor a motive for the act, could be imputed to the prisoner. The request was refused, and Denio, J., in discussing the question, says: "This would be precisely the same thing as advising them that they might acquit of murder on account of the prisoner's intoxication if they thought it sufficient in degree. It has been shown that this would be opposed to a well-established principle of law." He further remarks: "The judge ought to have charged that if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so, and that he must take the consequences of his own voluntary act." The doctrine thus laid down in principle would sustain the refusal of the judge to charge as requested in the case at bar. In *Kenny v. The People* (31 N. Y. 330), the prisoner was convicted of murder in the first degree, committed while in a state of voluntary intoxication, upon a sudden impulse. The court instructed the jury that voluntary intoxication can furnish no excuse or immunity for crime, and so long as the offender is capable of conceiving a design, he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts. The judge was requested to charge, among other things, that intoxication may be considered in determining whether the homicide was committed by a premeditated design, which was refused, and it was held by this court that there was no error in declining to charge as requested, and Potter, J., cites from *The People v. Rogers*, the remarks we have already quoted from the opinion in that

case, and says, that "The People *v.* Rogers, and the opinions delivered therein and the authorities cited, are conclusive and control this case." He further remarks that "the rule established in that case, and in fact the uniform rule in all the cases is, that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." This case is directly in point in regard to the subject of premeditation, and the principle laid down would seem to cover deliberation also. As, however, the judge subsequently, in response to a request made by the prisoner's counsel to the effect that the jury might take into consideration the question of drunkenness as affecting the fact of deliberation, said that he had so charged and had left it to the jury to determine as to the degree of murder and whether there was deliberation, and thus allowed the jury to consider the intoxication of the prisoner in reference to deliberation, it is not necessary to determine the question whether the refusal to charge as to deliberation was erroneous.

The judge also charged, in response to a request of the prisoner's counsel, that if the jury believed that the prisoner was under the influence of liquor or drink at the time of the commission of the act, they might take into consideration the drunkenness of the prisoner as to whether it did not render more weighty the presumption of his having yielded to sudden passion rather than to previous malice. In an earlier portion of his charge, he stated that premeditation and deliberation was essential to establish murder in the first degree, and the entire charge on the question discussed was quite as favorable to the prisoner as the evidence warranted. The evidence was quite clear as to the intention of the prisoner, and to sanction a rule that his drunkenness was an excuse would be adverse to the whole current of authority and what has been understood to be well-established law.

There was no error in the refusal of the judge to direct the jury, as requested by the prisoner's counsel, that they could not find the prisoner guilty of more than murder in the second degree. The proposition contained in this request assumes that there was no evidence of premeditation or deliberation upon which the jury could find the prisoner guilty of murder in the

first degree. This assumption was not warranted. The evidence showed that, about three months previous to the murder, the prisoner had been at work as a laborer under the deceased, who had discharged or caused him to be discharged; that the prisoner entertained unfriendly feelings toward the deceased; that shortly after the murder he declared he had fixed him at last; that the deceased had abused him; that he had satisfaction now; that he was not drunk, and knew what he was doing and saying, and used language indicating that he had acted with a deliberate purpose and a premeditated design to effect his death. It also appeared that he went to the room of deceased and with no immediate cause for provocation, and while the deceased lay there unconscious of danger, he turned down the bed-clothes and stabbed him with a knife to the heart, using strong and abusive language at the time. The evidence was quite clear that the prisoner had conceived the murder of the deceased, and even although he was under the influence of intoxicating drinks, it cannot be claimed, upon any sound principle, that there was no question for the jury to determine as to the deliberation and premeditation of the prisoner.

Several questions are raised as to the ruling of the judge upon the trial in regard to the testimony. The answer of the witness Flanigan upon re-direct examination, as to the declaration of the prisoner after the crime was committed, to wit: "I have stabbed Karins, get a mass said for my soul," is not liable to any valid objection. What he said as to having a mass said for his soul was not objected to, and no exception was taken to the evidence, nor was there any abuse of discretion on the part of the judge in allowing the question to which this response was an answer.

The weight to be given to the evidence, under the circumstances, was for the jury to determine, in view of the facts.

Nor was any error committed in excluding the question put upon the cross-examination to the witness, Flanigan, as to the time when he went to a certain place, which was named. It was not material, related to a period some time after he had seen the prisoner, and after the full examination which had been permitted, it was discretionary with the judge to determine whether the inquiry should be further pursued. (*People v. Casey*, 72 N. Y. 393-399.)

The question put to the witness, Mrs. Mangan, as to her paying the fine of the prisoner when he had been arrested for drinking, was irrelevant, and could have no direct or remote bearing upon the question arising as to the prisoner's guilt or innocence. It was rather remote for the purpose of accounting for the prisoner being at the house, and the testimony would not aid, we think, in contradicting the presumption of an intention to kill, or in showing that the act was rather one of temporary insanity or a drunken frenzy, than deliberation and premeditation. Above all, what had been done by or for the prisoner on prior occasions could not affect, in any way, his acts and conduct at the time the crime was committed, or relieve him from responsibility for the same.

No other question is presented by the counsel for the prisoner, and we are brought to the conclusion that no error was committed upon the trial which demands a reversal of the conviction. The judgment should, therefore, be affirmed, and the record remitted to the court below, with directions to proceed as required by law.

All concur; Andrews, J., entertained some doubt upon the point whether the court did not err in refusing to charge that the jury might consider the fact of drunkenness upon the point of premeditation, as well as upon the point of deliberation.

Judgment affirmed.

Osborn v. State, 26 S. W. 625; State v. Murphy, 118 Mo. 7, 25 S. W. 95; Lyle v. State, 31 Tex. Cr. Rep. 103; People v. Rogers, 18 N. Y. 9; Rafferty v. People, 66 Ill. 118; People v. Lewis, 36 Cal. 531; Fonville v. State, 91 Ala. 39; Beck v. State, 76 Ga. 452; State v. Lowe, 93 Mo. 547; State v. Gut, 13 Minn. 341; State v. Herdina, 25 Minn. 161; State v. Grear, 28 Minn. 426; U. S. v. McGlue, 1 Curtis 1; Shannahan v. Com., 8 Bush. 463; Swan v. State, 4 Humph. 136; Com. v. Hawkins, 3 Gray 463; Com. v. Malone, 114 Mass. 295; State v. Hundley, 46 Mo. 414; Cluck v. State, 40 Ind. 263; People v. O'Connell, 62 How. Pr. 436; People v. Robinson, 1 Park Cr. 649; Rex v. Carroll, 7 C. & P. 145; People v. Lewis, 36 Cal. 531; People v. Williams, 43 Cal. 344; U. S. v. Drew, 5 Mason 28; Rafferty v. People, 66 Ill. 118; Haile v. State, 11 Humph. 153; Pirtle v. State, 9 Humph. 663; Clark, p. 60; Bishop I., Sec. 399 *et seq.*; Wharton, Sec. 48 *et seq.*; Hawley & McGregor, p. 20; The Penal Code of Pa.; Shields, vol. I., 400, 404, 406, 410, 416, 430, 450.

NOTE.—The early common law doctrine was that drunkenness aggravated instead of mitigating the offense.

State v. Thompson, Wright (Ohio) 617; U. S. v. Forbes, Crabbe 558; Clark, p. 65; Wharton, Sec. 49.

NOTE.—In some States if the accused did not become intoxicated for the purpose of committing the crime, nor intended to commit the crime before he became intoxicated, and was so drunk at the time of committing the offence as not to know what he was doing, he cannot be convicted.

State v. Davis, 9 Houst. 407, 33 Atl. Rep. 55; State v. Garvey, 11 Minn. 95; Aszman v. State, 123 Ind. 347; 8 L. R. A. 33; Clark, p. 65; Bishop L., Sec. 405.

NOTE.—Specific intent. Drunkenness is a defence when a specific intent is an essential ingredient of the crime; or it may be shown to lessen the degree of the offense, when it depends upon malice or deliberation.

People v. Walker, 38 Mich. 156; State v. Robinson, 20 W. Va. 713; State v. Johnson, 40 Conn. 136; Hopt v. People, 104 U. S. 631; State v. Bell, 29 Ia. 316; People v. Blake, 65 Cal. 275; Roberts v. People, 19 Mich. 401; Marshall v. State, 59 Ga. 154; People v. Harris, 29 Cal. 679; People v. Eastwood, 14 N. Y. 562; Wood v. State, 34 Ark. 341; Mooney v. State, 33 Ala. 419; Golliher v. Com., 2 Duval 163; State v. Avery, 44 N. H. 392; Nichols v. State, 8 Ohio St. 435; Lytle v. State, 31 Ohio St. 196; Pegman v. State, 14 Ohio 555; Minn. Stat. 1894, Sec. 6304; N. Y. Penal Code, Sec. 22; Clark, p. 62; Bishop L., Sec. 408 *et seq*; Wharton, Sec. 52; Hawley & McGregor, p. 22.

(4) *Coverture.*

At common law by virtue of the coverture theory married women were *prima facie* not liable for crimes committed in their husbands' presence. This presumption did not cover cases of treason, murder and robbery.

Com. v. Neal, 10 Mass. 152; Com. v. Burk, 11 Gray 437; Com. v. Welch, 97 Mass. 593; Com. v. Eagan, 103 Mass. 71; State v. Fitzgerald, 49 Ia. 260; State v. Kelly, 74 Ia. 589; Com. v. Gannon, 97 Mass. 547; Edwards v. State, 27 Ark. 493; People v. Wright, 38 Mich. 744; Tabler v. State, 34 Ohio St. 127; Clark, p. 77 *et seq*; Bishop L., Sec. 356 *et seq*; Wharton, Sec. 75 *et seq*; Hawley & McGregor, p. 16.

NOTE.—Some States do not recognize this doctrine.

Minn. Stat. 1894, Sec. 6306; N. Y. Penal Code, Sec. 24; Freil v. State, 21 Ark. 212; Edwards v. State, 27 Ark. 493.

(5) Corporations.

Corporations are generally liable for their criminal acts ; but some crimes, from its nature, a corporation cannot commit.

THE STATE *v.* THE MORRIS AND ESSEX RAILROAD CO.

Supreme Court of New Jersey, 1852.

23 N. J. L. 360.

THE CHIEF JUSTICE. The indictment charges the defendants with the creation of a nuisance, by erecting a building upon the public highway and continuing it there; and also by placing cars in the public highway, and suffering them to remain therein. The single question presented for the consideration of the court is, whether a corporation aggregate is liable to be proceeded against by indictment for any offence committed by active means or by an affirmative act, which must of necessity be charged to have been done *vi et armis*.

The law is well settled, that a corporation aggregate is liable to indictment. It is said, indeed, by Blackstone, that a corporation cannot commit treason, felony, or other crime, in its corporate capacity, citing the case of Sutton's Hospital, 10 Coke 32. The original authority is simply, that a corporation cannot commit treason. While it is conceded that a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving *malus animus* in its commission, it is believed that there is no authority, ancient or modern, which denies the liability of a corporation aggregate to indictment, except an anonymous case, said to have been decided by Chief Justice Holt, in the Court of King's Bench, in the 13 Will. 3 (1701). The case is reported, in 12 Mod. 559, briefly as follows: "Note per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are." It may well be doubted whether this is not one of those cases which extorted from Lord Holt the bitter complaint of his reporters, "that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on

the bench." Aside from the apocryphal character of the report, it is hardly credible that so learned and accurate a judge as Lord Holt should have laid down the broad proposition imputed to him by his reporter. It is certain that while he was chief justice of the King's Bench, there were cases before that court of indictments against *quasi* corporations for neglect to repair roads and bridges.

Regina v. The County of Wilts, 1 Salk. 359; *The Queen v. The Inhabitants of Cluworth*, 6 Mod. 163, S. C.; 1 Salk. 359, and in the *Queen v. Saintiff*, 6 Mod. 255, Lord Holt himself held, that if a common footway be in decay, an indictment must of necessity lie for it, because an action will not lie without a special damage. It seems to be true, moreover, as was stated by Talfourd, Sergeant Arguendo, in the *Queen v. Railway Co.*, 3 Queen's Bench 227, that although there was at that time no direct authority in England for the position, that a corporation aggregate is indictable in the corporate name, yet the course of precedents has been uniform for centuries, and the doctrine has frequently been taken for granted, both in arguments and by the judges. The case of *Langforth Bridge*, Cro. Car. 365 (1635); *Regina v. The Inhabitants of the County of Wilts*, 1 Salk. 359 (1705); *The King v. Inhabitants of the West Riding of Yorkshire*, 2 Blac. Rep. 685 (1770); *Rex v. The Inhabitants of Great Poughton*, 5 Burr. 2700 (1771); *The King v. The Inhabitants of Clifton*, 5 D. & E. 499 (1794); *Rex v. The Corporation of Liverpool*, 3 East 86 (1802); *Rex v. Mayor of Stratford upon Avon*, 14 East 348 (1811); *Rex v. The City of Gloucester*, Dougherty's Crown Circ. Ass. 259.

Notwithstanding the frequent instances to be found in the books of indictments against aggregate corporations for neglect of duty imposed by law, the liability of a corporation to indictment was not expressly adjudicated in Westminster Hall until the very recent case of *The Queen v. The Birmingham and Gloucester Railway Co.*, 9 Car. & Payne 469, 3 Queen's Bench 223. In that case, it was directly adjudged that a corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute.

The same principle has been repeatedly recognized in the

American courts, both before and since the decision in *The Queen v. The Birmingham and Gloucester Railway Company*. *Mower v. Leicester*, 9 Mass. 250; *Howard v. North Bridgewater*, 16 Pick. 190; *The Susquehanna and Bath Turnpike Co. v. The People*, 15 Wend. 267; *Freeholders v. Strader*, 3 Harr. 108.

In this State, there is an express legislative recognition of the liability of corporations to indictment. The act of February 10, 1837 (Rev. Stat. 999), provides a mode of compelling the appearance of corporations to indictments, and of enforcing sentence upon conviction. It is not understood that the counsel for the defence question or deny the liability of a corporation aggregate to indictment. The question discussed upon the argument was, not whether a corporation aggregate may be indicted, but for what offence it may be indicted, or what offence a corporation aggregate may in its corporate capacity commit.

It is insisted, that although a corporation is liable to indictment for neglect of duty or mere nonfeasance, it cannot be indicted for any offence requiring for its commission a direct and positive act. I am aware of but two cases in which this question has been directly presented for judicial decision. In the case of *The State v. The Great Works Milling and Man. Co.*, 20 Maine Rep. 41, the defendants were indicted for a nuisance in the erection of a dam across the Penobscot river. At June term, 1841, the Supreme Court of Maine decided that the indictment could not be sustained, on the ground that where a crime or misdemeanor is committed by any positive or affirmative act, under color of corporate authority, the individuals acting, and not the corporation, should be indicted.

In *The Queen v. The Great North of England Railway Co.*, 9 Queen's Bench 315, the defendants were indicted for cutting through and obstructing a highway, by works performed in a course not conformable to the powers conferred on the company by act of parliament. The indictment, after solemn argument and deliberate advisement, was sustained by the unanimous opinion of the Court of Queen's Bench, the court thus sustaining the principle, that a corporation aggregate may be indicted for a misfeasance.

These two authorities being directly in conflict, it may be necessary to consider the principle involved in the inquiry. It

being conceded that an indictment will lie against a corporation aggregate for a nonfeasance, or for any cause whatever, all preliminary and formal objections arising out of the invisibility and intangibility of the body aggregate, the impossibility of arresting it, its inability to appear, its incapacity for punishment, and the injustice of punishing innocent stockholders for the acts of others, are at once disposed of. These objections apply, it is obvious, with equal force to indictments for acts of nonfeasance. If they are invalid as to the one, they are equally so as to the other.

But it is said, that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. Thus it is liable in trover. *Tarborough v. The Bank of England*, 16 East 6; *Duncan v. The Surrey Canal*, 3 Stark. 50; *Foster v. The Essex Bank*, 17 Mass. 503; *Beach v. The Fulton Bank*, 7 Cowen 485. In case for indirect injuries resulting from tortious acts as well as from negligence—*Bridge v. The Grand Junction Railway Co.*, 3 Mees & W. 244; *The Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6; *Thayer v. Boston*, 19 Pick. 511; *Bailey v. The Mayor of New York*, 3 Hill 531 S. C. (in error), 2 Denio 433; *Baptist Church v. Schenectady and Troy Railroad*, 5 Barbour's Supreme Court R. 79; *Wilson v. The Rockland Manufacturing Co.*, 2 Harring's R. 67. In trespass *quare clausum fregit*—*Bloodgood v. The Mohawk and H. Railroad Co.*, 14 Wend. 54, S. C., 18 Wend. 9; *Thatcher v. The Dartmouth Bridge Co.*, 18 Pick. 501; *The Seneca Railroad Co. v. The Au-*

burn and R. Railroad Co., 5 Hill 170; *Van Wormer v. The Mayor of Albany*, 15 Wend. 262. In trespass *vi et armis* to personal property—*Maund v. Monmouthshire Canal Co.*, 4 Man. & Gran. 452; *Hay v. Cohoes Co.*, 3 Barbour's Sup. Co. R. 42; *Whiteman's Executors v. The Wil. and Susq. Railroad Co.*, 2 Harring's R. 514. And in ejectment—*Dater v. The Troy Railroad and Turnpike Co.*, 2 Hill 631.

So a corporation may be guilty of a *disseisin*. *Second Precinct v. Catholic Cong.*, 23 Pick. 140; *Proprietors of the Canal Bridge v. Gordon*, 1 Pick. 296; and even of an assault and false imprisonment. *Eastern Counties Railway Co. v. Brown*, 2 Law and Eq. 406.

These cases have all arisen within the present century, and are certainly in conflict with the ancient doctrine, as laid down by the venerable sages of the law, if not by the authority of the courts. *Liber Ass.* fol. 100, pl. 67; *Brooke's Ab. "Corporations,"* 43, "Trespass," 239; *Com. Dig. "Corporations,"* F. 19, "Pleader" 2 B.; 2 *Impey's Prac.* 675; 2 *Sell. Pr.* 78; *Viner's Ab. "Corporations,"* P. Sec. 2, 2 Sec. 15; 1 *Saund. P. & E.* 386; 1 *Bl. Com.* 476; 1 *Wooddeson's Lec.* 296; and 8 *East* 230, per Lawrence, J.

The earlier authorities, denying the liability of corporations *civiliter* for torts, are nearly all traceable to the *dictum* of Chief Justice Thorpe, in *Liber Ass.* 100, pl. 67, that "a writ of trespass lies not against a commonalty, for, he said, a man shall never have a *capias* or *exigent* against a commonalty." From this view of the law, it would seem that the difficulty in holding corporations liable *civiliter* for their tortious acts was originally supposed to consist not in the inability of the corporations to commit the wrong, but in the incapacity of the courts to administer the remedy.

The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents, done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act. The doctrine is founded on sound principle, and applies, so far at least as the present objection is concerned, as well to the criminal as to the civil liability of the corporation.

It is further objected, that a corporation aggregate cannot be liable to indictment for any crime, because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in *The Chestnut Hill Turnpike Co. v. Rutter*, 6 Binney 12. "According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it: it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice."

But why should corporations be held liable for nonfeasance, and not for misfeasance? why for neglect of duty, and not for violation of law? The startling incongruity of allowing the exemption, is (as was said by Lord Denman, in *The Queen v. The Great North of England Railway Company*), one strong argument against it.

It is said, again, that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than to the mere agent; and in the case of corporations, it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated, than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who in a great majority of cases, would be alike unknown and irresponsible.

It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation.

Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient. But the creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offence a corporation should not be indicted.

There is a strong reason, which does not seem to have been adverted to in the reported cases, why the corporation, and not the individual directors or laborers, should be indicted for the creation of a nuisance. The principal object of an indictment for a nuisance, is to compel it to be abated; and regularly a part of the judgment upon conviction is, that the nuisance be abated. 1 Hawk. P. C., ch. 75, Sec. 14; *Queen v. The Inhabitants of Chuworth*, 1 Salk. 358, S. C.; 6 Mod. 234; 1 Chit. Crim. Law 716; *The King v. Stead*, 8 D. & E. 142; *Commonwealth v. Wright*, Angel on Tidewaters 222.

A similar judgment was rendered in the case of *The State v. King*, in the Passaic Oyer and Terminer, which has since been affirmed in the Court of Errors and Appeals. If the rights of the corporation are to be concluded by the judgment, as in the present case, a valuable building, erected by the company at great cost for their own convenience, is to be ordered to be torn down as an encroachment upon the highway, there is peculiar propriety in making the corporation itself a party, and giving it an opportunity of being heard in defence. To condemn the property of the corporation to destruction upon an indictment against an irresponsible individual who was employed in the construction of the work, but who has no interest in the company, and who perhaps is hostile to its interests, savors strongly of the injustice of condemning them unheard. And it is not clear how the sentence is to be executed against the corporation, who are in possession, and in no sense parties to the proceeding.

I am of opinion that the judgment below should be affirmed.

NEVINS, J. This is an indictment, found by the grand jury of the county of Morris, against the plaintiffs in error, who are an incorporated railroad company, upon which they were convicted before the Court of Oyer and Terminer and General Jail Delivery of that county.

The indictment contains two counts. The first charges them with erecting and maintaining a building upon a certain public highway, and thereby creating a nuisance and obstruction to the free use of said highway. The second charges them with obstructing said highway upon divers days, and for certain periods of time on each day, by permitting and suffering their train of cars to stand upon it, and thereby injuriously and unlawfully impeding and preventing the travel, &c., to the great damage and common nuisance, &c.

It is not denied in the argument, nor can it be, that an indictment will lie for the erection or continuance of a nuisance or unlawful obstruction, on a public highway. All common and public nuisances, which aggrieve, annoy, or impair the common rights of the community, may be punished criminally by indictment. The offence charged in this indictment is of that character, a public and common nuisance, and undeniably an indictable offence, if committed by an individual. But it is here insisted, that an incorporated company, as such, cannot be indicted for any positive and affirmative act, which in its nature must be the act of an individual, and committed with force. The principle being admitted, that the person who erects a public nuisance may be indicted for it, let us inquire whether an artificial person, or an incorporated company, in their corporate capacity, can erect or maintain, and continue a public nuisance. For if they can, *ex vi termini*, they may be indicted. It requires no great ingenuity to show that a company, as such, may be guilty of a public nuisance. A canal company, acting within the scope of its chartered rights, constructs a canal across a public highway or road, but neglects to erect a bridge for the accommodation of the public travel; such canal becomes a nuisance, as well by the act, as by the neglect of the company. So if a railroad company erects an embankment across a public highway, which by law they may be authorized to do, or make a deep excavation across such road, without providing the means for the public to pass over it, such embankment or excavation becomes a nuisance, and the company criminally responsible for it. So in the case before us, the plaintiffs in error, having a right to erect buildings for the transaction of their business, by their own act, or the act of their agents under their direction, erect a building on a public highway,

where by law they have no right to erect it, it becomes a public nuisance. And there would be little justice in proceeding against the agent or servant of the company, and subjecting him to fine and imprisonment, for an act which he may have performed in good faith, and suffering his employers not only to escape punishment, but leaving them in the enjoyment of all the profits and advantages of their illegal erection.

But it was urged in the argument, that a corporation, as such, cannot commit crime; that it cannot be guilty of a battery or murder. Be it so; yet it will not follow that it may not be guilty of erecting a nuisance, or continuing one already erected, which it has become their legal duty to abate. So a single individual cannot be indicted for a riot, yet if he associates himself with others to commit one, all may be indicted.

In Angell & A. on Corporations, page 396, in answer to the remark, "That a corporation is not indictable, though its members may be," it is said, "that this only applies to crimes and misdemeanors, but that an indictment may lie against a corporation, or county, or parish."

Whatever may have been the received doctrine of the common law in early times, when corporations were fewer than now, touching their criminal responsibility, very many modern cases are to be found in the books where they have been held liable to indictment. See *Man. & G.* 237; 9 *A. & E.* 314; 3 *Barb.* 42; 20 *Pick.* 140; 6 *J. R.* 90, and very many other cases. But if there were no precedent to be found, I think this indictment good upon every sound principle of law and justice. Let the judgment be affirmed.

OGDEN, J., concurred.

Com. v. Pulaski Co. Ag. & Mech. Ass'n, 92 Ky. 197, 17 S. W. 442; *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302; *Louisville & Nashville R. R. Co. v. State*, 3 Head 523; *State v. Atchison*, 3 Lea 729; *Stewart v. Waterloo Turn Verein*, 71 Ia. 226; *Del. Canal Co. v. Com.*, 60 Pa. 367; *Com. v. Prop'rs of New Bedford Bridge*, 2 Gray 339; *The Penal Code of Pa.*; *Shields*, vol. I., 255, 256, 264, 266, 267, 279, 308, 486, 488, 489, 490, 570.

Contra.—*State v. Cin. Fertilizer Co.*, 24 Ohio St. 611; *Clark*, 78 *et seq.*; *Bishop I.*, Sec. 417 *et seq.*; *Wharton*, Sec. 91 *et seq.*; *Hawley & McGregor*, p. 24.

c.

Ignorance of Law.

Ignorance of the law is not an excuse for criminal acts ; but when a specific intent is required to make the act criminal, it may be a relevant fact.

JELICO COAL MIN. CO. v. COMMONWEALTH.

Court of Appeals of Kentucky, 1895.

97 Ky. 246; 29 S. W. 26.

GRACE, J. This is an appeal by the Jellico Coal Mining Company from a judgment of \$100 rendered against it by the Whitely circuit court, upon an indictment filed in said court on the 18th May, 1893, charging that said corporation, though doing business in Kentucky, had not on the 8th day of May, 1893, nor for some time prior thereto, filed a statement, by either its president or secretary, in the office of the secretary of state at Frankfort, Ky., giving the location of its principal office, and its agent at said place upon whom service of process might be made. The chief ground relied upon by said appellant for failure to file such a statement is that it did not know of the existence of the law requiring same to be so filed. The law of the State taking effect April 5, 1893, as found in section 571 of Kentucky statutes, under title "Corporations," requires such a statement to be filed. The case was submitted to the jury, upon an agreed state of facts, whereby it was agreed "that this law on corporations (having been passed long enough to take effect April 5, 1893) was, by order of the legislature, printed about April 25, 1893, and then distributed by the secretary of state, as fast as possible, to clerks of county courts, banks, lawyers, and corporations, and that no copy was sent to appellant; and, further, that in fact said corporation, its agents and employes, were in fact ignorant of the existence of such statute until the 24th day of May, 1893, when they were informed of same by their attorney, R. D. Hill, and that thereupon said defendant immediately, on the 29th day of May, 1893, filed in the office of secretary of state, at Frankfort, the necessary statement; that defendant was at and before the pas-

sage of said law a corporation created by the laws of Kentucky, doing business in Whitley county, Ky., where it had an office, and an agent upon whom process could have been served. It was further agreed by the parties that a synopsis of this corporation law was published by some of the daily papers in Louisville about the 6th or 7th of April, 1893, and that said papers circulated in Whitley county, but was not called to the attention of the defendant." Upon this agreed statement of fact, the court instructed the jury to find for the commonwealth. The usual exceptions were taken, and the case brought up.

The counsel for appellant, while conceding the general doctrine "that every person is presumed to know the law," yet insists that this is not an absolute conclusive presumption, but only one that may be rebutted by evidence, and, surely, that the commonwealth may agree absolutely and unconditionally, as she did in this case, that appellant was ignorant of the law, and thus agree herself out of court. We cannot view the matter in this light. The maxim, slightly changed, and as applicable to all criminal prosecutions, being that "ignorance of the law excuses no one," is one of the oldest and most valuable maxims of criminal procedure. It lies at the very basis of all successful criminal prosecutions. It is not so much a presumption of fact as a fact, as it is a conclusion or presumption of the law, indispensably necessary to be made by the courts alike applicable to all criminal prosecutions. Without it the court would be powerless to maintain any effective and valuable administration of the criminal code. In point of antiquity, it dates back to a time whereof the memory of man runneth not to the contrary; and while it may be possible that now and then, in isolated cases, there may be apparent hardships, yet we are unable to conceive or formulate any modification of the rule, whereby appellant in this case can be released from the operation of the general principle, without utterly destroying same, and such a ruling is not to be thought of. Let the judgment of the lower court be affirmed.

U. S. v. Anthony, 11 Blatch 200; People v. Killington, 36 Pac. 13; U. S. Reynold, 98 U. S. 145; Cutter v. State, 36 N. J. L. 125; State v. Goodnow, 65 Me. 30; Com. v. Stebbins, 8 Gray 492; State v. Kluseman, 53 Minn. 541; Clark, p. 66; Bishop L., Sec. 294; Wharton, Sec. 84; Hawley & McGregor, p. 26.

d.

Negligence.

Carelessness and negligence may supply the want of a direct criminal intent. One doing what the law forbids is guilty of a wrong founded in *malice*. One who fails to do what it commands is guilty of a wrong founded in *neglect*.

Negligence to be criminal must be culpable; of a nature "gross, wanton or wicked."

THE STATE v. O'BRIEN.

Supreme Court of New Jersey, 1867.

3 Vroom. 169 (32 N. J. L.)

INDICTMENT for manslaughter and case certified.

DALRIMPLE, J. On the 15th day of November, 1865, the defendant was a switch-tender, in the employ of the New Jersey Railroad and Transportation Company. His duty was, to adjust, and keep adjusted, the switches of the road at a certain point in the city of Newark, so that passenger trains running over the road would continue on the main track thereof, and pass thence to the city of Elizabeth. He failed to perform such duty, whereby a passenger train of cars, drawn by a locomotive engine, was unavoidably diverted from the main track to a side track, and thence thrown upon the ground. The cars were thrown upon each other with great force and violence, by means whereof one Henry Gardner, a passenger upon the train, was so injured that he died. The defendant was indicted for manslaughter, and convicted upon trial in the Essex Oyer and Terminer. He insisted, and in different forms, asked the court to charge the jury, that he could not legally be convicted, unless his will concurred in his omission of duty; the court refused so to charge. A rule to show cause why the verdict should not be set aside was granted, and the case certified into this court for its advisory opinion, as to whether there was any error in the charge of the court below, or in the refusal to charge, as requested.

The indictment was for the crime of manslaughter. If the defendant's omission of duty was wilful, or in other words, if his will concurred in his negligence, he was guilty of murder. Intent to take life, whether by an act of omission or commission, distinguishes murder from manslaughter. In order to make out against the defendant the lesser offence of manslaughter, it was not necessary that it should appear that the act of omission was wilful or of purpose. The court was right in its refusal to charge, as requested.

The only other question is, whether there is error in the charge delivered. The error complained of is, that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. Professor Greenleaf, in the third volume of his work on evidence, Sec. 129, in treating of homicide, says: "It may be laid down, that where one, by his negligence, has contributed to the death of another, he is responsible. The caution which the law requires in all these cases, is not the utmost degree which can possibly be used, but such reasonable care as is used in the like cases, and has been found, by long experience, to answer the end." Wharton, in his *Treatise on Criminal Law*, p. 382, says: "There are many cases in which death is the result of an occurrence, in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible, depends upon the inquiry, whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of misadventure, must be proportioned to the probability of danger attending the act immediately conducive to the death." The propositions so well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. The charge in the respect complained of, was in accordance with them. It expressly states, that it was a question of fact for the jury to settle, whether the defendant was, or was not guilty of negligence; whether his conduct evinced under the circumstances such care and diligence as were proportionate to the danger to life impending. The very definition of crime is an act omitted or committed

in violation of public law. The defendant in this case omitted his duty under such circumstances, as amounted to gross or culpable or criminal negligence. The court charged the jury, that if the defendant, at the time of the accident was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds the question, in fact, involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. He was found to have been grossly negligent in the performance of that duty, whereby human life was sacrificed. His conviction was right, and the court below should be so advised.

State v. Smith, 65 Me. 257; *Reg. v. Wagstaffe*, 10 Cox C. C. 530; *State v. Hardister*, 38 Ark. 605; *Regina v. Nicholls*, 13 Cox C. C. 75; *State v. Hawkins*, 77 N. C. 494; *Com. v. Metro. R. R.*, 107 Mass. 236; *State v. Preslar*, 3 Jones 421; *U. S. v. Warner*, 4 McLean 463; *Sparks v. Com.*, 3 Bush. 111; *Collier v. Georgia*, 39 Ga. 31; *Robertson v. State*, 2 Lea 239; *Clark*, p. 48; *Bishop I.*, Secs. 313-332; *Wharton*, Sec. 125 *et seq.*; *Hawley & McGregor*, p. 449; *The Penal Code of Pa.*; *Shields*, vol. I., 189, 199, 215; *Minn. Stat. 1894*, Secs. 6449, 6451 *et seq.*

e.

Coercion or Duress.

The law recognizes only such fear as an excuse for criminal acts as proceeds from an immediate and actual danger threatening the very life of the party, and from which there is no escape.

ARP v. THE STATE.

Supreme Court of Alabama, 1893.

97 Ala. 5; 12 So. Rep. 301.

COLEMAN, J. At the July Term, 1892, of the Circuit Court, the defendant was convicted of murder in the first degree, and sentenced to suffer death.

The defendant moved to quash the *venire* summoned: 1st. Be-

cause some of the jurors summoned on the special *venire* had served as regular jurors during the preceding week. 2d. Because Wm. Jackson, who was summoned as a regular juror for the week, had not been a resident of the State or county for the preceding twelve months. 3d. Because one C. H. McCullough, whose name appears on the *venire*, served as a regular juror at the January Term, 1892. These several motions were properly overruled.—Criminal Code, Sec. 4301; *Fields v. State*, 52 Ala. 351; *Gibson v. State*, 89 Ala. 126.

The objections to the empaneling of the jury were as follows: 1st. That one of the jurors drawn failed to answer, it appearing that said juror was at that time serving as a juror on another case, and was out considering that case. The second objection is the same as the first. 3d. That one of the jurors drawn had not been a resident of the State or county for the past preceding twelve months, and was excused for cause. 4th. That one of the persons whose name was drawn, who had been summoned to serve as a juror, failed to answer when called. 5th. That one of the persons summoned as a juror was over the age of seventy, who was challenged by the State for cause. 6th. That one of the persons summoned, on his examination as to his competency, stated that he had heard a part of the evidence at a preliminary examination of the defendant, and from that evidence had formed an opinion as to the guilt or innocence of the defendant, but that in his judgment said opinion would not bias his verdict. Upon this statement the court pronounced the person competent to serve as a juror. Each of these objections have been adjudicated by this court, and declared to be without merit. See the following authorities: On the first and second propositions, *Johnson v. State*, 94 Ala. 40, and authorities cited; on the third proposition, *Field's Case*, 52 Ala. *supra*, and *Gibson's Case*, 89 Ala. *supra*; on the 4th, *Johnson v. State*, *supra*; on the 5th, Criminal Code, Sec. 4331, sub-div. 8; on the 6th, *Hammill v. State*, 90 Ala. 577. Neither of the objections come within the principle decided in the case of *McQueen v. State*, 94 Ala. 52, or of *Darby v. State*, 92 Ala. 9.

The confessions of the defendant were voluntarily made and were properly admitted. Moreover, the defendant himself, who testified in his own behalf, did not deny they were voluntarily

made, but himself testified substantially as true the main fact given in evidence as confessions. The testimony of the defendant and the evidence admitted as confessions, showed that he took the life of the deceased, without provocation on the part of the deceased, and when there was no real or apparent necessity for the act so far as such necessity proceeded from the deceased. According to his own statement, the object to be accomplished by taking the life of the deceased was to prevent deceased from appearing as a witness against him, and one Burkhalter and Leith, charged with retailing whiskey without license. The defendant's excuse for the homicide was that Burkhalter and Leith threatened to take his life unless he killed deceased; that they were present, armed with double-barrelled shot guns, and threatened to kill him unless he killed deceased, and that it was through fear and to save his own life he struck deceased with an axe. He admits that after having struck deceased down he rifled the pockets and took what money was found in the pockets of the deceased.

On this phase of the evidence the court was asked to give the following charge: "If the jury believe from the evidence that the defendant killed Pogue under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty." The court refused this charge, and the refusal is assigned as error. This brings up for consideration the question, what is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty when placed under such circumstances?

The fact that defendant had been in the employment of Burkhalter is no excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, or of a principal to his agent, will not justify a criminal act done in pursuance of such command.—1 Bishop, Sec. 355; *Reese v. State*, 73 Ala. 18; 4 Blackstone, Sec. 27.

In a learned discussion of the question, to be found in *Leading Criminal Cases*, Vol. 1, p. 81 and note on p. 85, by Bennett & Heard, it is declared that "for certain crimes the wife is responsible, although committed under the compulsion of her hus-

band. Such are murder," &c. To the same effect is the text in 14 Am. & Eng. Encyc. of Law, p. 649; and this court gave sanction to this rule in *Bibb v. State*, 94 Ala. 31; 10 So. Rep. 506. In Ohio a contrary rule prevails in regard to the wife.—*Davis v. State*, 15 Ohio, 72; 45 Amer. Dec. 559. In Arkansas there is a statute specially exempting married women from liability, when "acting under the threats, commands or coercion of their husbands," but it was held under this act there was no presumption in favor of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats or commands."—*Edwards v. State*, 27 Ark. 493, reported in 1 Criminal Law by Green, p. 741.

In the case of *Beal v. The State of Ga.*, 72 Ga. Rep. 200, and also in the case of *The People v. Miller*, 66 Cal. 468, the question arose upon the sufficiency of the testimony of a witness to authorize a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion, he was not an accomplice. The defendants were convicted in both cases.

In the case of *Rex v. Crutchly*, 5 C. & P. 133, the defendant was indicted for breaking a threshing machine. The defendant was allowed to prove that he was compelled by a mob to go with them and compelled to hammer the threshing machine, and was also permitted to prove that he ran away at the first opportunity.

In *Hawkins' Pleas of the Crown*, Vol. 1, Ch. 28, Sec. 26, it is said: "The killing of an innocent person in defence of a man's self is said to be justifiable in some special cases, as if two be shipwrecked together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrusts the other from it, whereby he is drowned, it seems that he who thus preserved his own life at the expense of that other, may justify the fact by the inevitable necessity of the case."

In 1 *Hale's Pleas of the Crown*, Ch. VIII, Sec. 50, it is said "There is to be observed a difference between the times of war, or public insurrection or rebellion, when a person is under so great a power, that he can not resist or avoid, the law in some

cases allows an impunity for parties compelled, or drawn by fear of death to do some acts in themselves capital, which admit no excuse in time of peace. * * * Now as to times of peace, if a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death doth not excuse him, if he commit the act; for the law hath provided a sufficient remedy against such fears by applying himself to the court and officers of justice for a writ or precept *de securitate pacis*. Again, if a man be desperately assaulted, and in peril of death, and can not otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person, the present fear of actual force will not acquit him of the crime and punishment of murder, if he commit the act; for he ought rather to die himself than kill an innocent; but if he can not otherwise save his own life, the law permits him in his own defence to kill his assailant."

Blackstone, Vol. 4, Sec. 30, declares the law to be, "Though a man be violently assaulted, and has not other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent."

In Stephen's Commentaries, Vol. 4, Book 6, Ch. 2, pp. 83-4, the same rule is declared to be the law.

In East's Crown Law, the same general principles are declared as to cases of treason and rebellion, &c. But on page 294, after referring to the case of two persons being shipwrecked and getting on the same plank, proceeds as follows: "Yet, according to Lord Hale, a man can not even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life unless he comply. But if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems no reason why this offence may not be mitigated upon the like consideration of human infirmity. But if the party might, as Lord Hale, in one place, supposes, have recourse to the law for his protection against such threats, it will certainly be no excuse for committing murder."

In Russell on Crimes, Vol. 1, Sec. 699, it is stated as follows: "The person committing the crime must be a free agent, and not subject to actual force at the time the act is done; thus, if A by force take the arm of B, in which is a weapon and therewith kill

C, A is guilty of murder, but not B. But if it be only a moral force put upon B, as by threatening him with duress or imprisonment or even by an assault to the peril of his life in order to compel him to kill C, it is no legal excuse."

In the case of *Regina v. Tyler*, reported in 8 Car. & Payne 618, Lord Denham, C. J. declares the law as follows: "With regard to the argument, you have heard, that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties, for such reason, are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. * * * The law is that no man, from a fear of consequences to himself, has a right to make himself a party committing mischief on mankind."

In the case of *Respublicae v. McCarty*, 2 Dallas 86, when the defendant was on trial for high treason, the court uses this language: "It must be remembered that, in the eye of the law, nothing will excuse the act of joining the enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property."

The same rule in regard to persons charged with treason as that stated in Hale's Pleas of the Crown is declared in Hawkins, Vol. 1, Ch. 17, Sec. 28 and note, and both authors hold, that "the question of the practicability of escape is to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defence '*pro timore mortis*' will not be available."

This principle finds further support in the case of *U. S. v. Greiner*, tried for treason, reported in 4 Phil. 396, in the following language: "The only force which excuses on the grounds of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service, and that it is incumbent in such a case upon him who makes force his defence to show an actual force, and that he quitted the service as soon as he could."

Wharton's Criminal Law, Vol. 1, Sec. 94, under the head of Persons under Compulsion, says "Compulsion may be viewed in two aspects: 1. When the immediate agent is physically forced to do the injury, as when his hand is seized by a person of

superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced. 2. When the force applied is that of authority or fear. Thus, when a person not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible, if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence. Thus, it is a defence to an indictment for treason, that the defendant was acting in obedience to a *de facto* government, or to such concurring and overbearing sense of the community in which he resided as to imperil his life in case of dissent." In section 1803a of the same author (Wharton), it is said: "No matter what may be the shape compulsion takes, if it affects the person and he yielded to it *bona fide*, it is a legitimate defence."

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason, or fear from the party slain, and in none of them is there a rule different from that declared in the common law authorities cited by us.

Bishop on Criminal Law, Secs. 346, 347, 348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared: "That always an act done from compulsion and necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life, is, in general, to be considered as compelled."

The cases cited to these propositions show the facts to be different from those under consideration. The case referred in I Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood, during a severe tempest, to save his vessel and the remainder of his cargo. The other 5 Q. B. 279, was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of Tate v. The State, Black. 73, was also that of a supervisor of the public highway, and the others were cases of treason, to which reference has been made. In section 348, the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East P. C., to which reference has already been made. In section 845, the same author uses the following language: "The cases in which a

man is clearly justified in taking another's life to save his own are when the other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another." Italics are ours—emphasized to call attention to the fact, that the author is careful to content himself more with a reference to the authorities, which declare these principles of law than an adoption of them as his own.

The authorities seem to be conclusive that, at common law, no man can excuse himself, under the plea of necessity or compulsion for taking the life of an innocent person.

Our statute has divided murder into two degrees, and affixed the punishment for each degree, but in no respect has added to or taken away any of the ingredients of murder as known at common law.—*Mitchell v. State*, 60 Ala. 26; *Fields v. State*, 52 Ala. 352.

That persons have exposed themselves to imminent peril and death for their fellow man, and that there are instances, where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self sacrifices emanated from other motives than the fear of legal punishment. That the fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death, unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind, who are controlled by no other higher principle than fear of the law. Be this as it may, there are other principles of law undoubtedly applicable to the facts of this case, and which we think can not be ignored.

The evidence of the defendant himself shows that he went to Burkhalter's house about nine o'clock of the night of the killing, and there met Burkhalter and Leith, and that it was there, and at that time, they told him he must kill Pogue. The evidence is not clear as to how far it was from Burkhalter's to Pogue's dwelling, where the crime was perpetrated; but it was sufficient to show that there was some considerable distance between the places, and he testifies as they went to Pogue's, they went by the

mill and got the axe, with which he killed him. Under every principle of law, it was the duty of the defendant to have escaped from Burkhalter and Leith, after being informed of their intention to compel him to take the life of Pogue, as much so as it is the duty of one who had been compelled to take up arms against his own government, if he can do so with reasonable safety, to himself; or of one assailed to retreat, before taking the life of his assailant. Although it may have been true, that at the time he struck the fatal blow, that he had reason to believe he would be killed by Burkhalter and Leith, unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them, with reasonable safety, and he failed to do so, but remained with them until the time of the killing, the immediate necessity or compulsion under which he acted at that time would be no excuse to him. As to whether escape was practicable to defendant, as we have stated, was a question of fact for the jury. The charge, numbered 1 and refused by the court, ignored this principle of law and phase of evidence, and demanded an acquittal of defendant, if at the time of the killing the compulsion and coercion operated upon the defendant, and forced him to the commission of the act notwithstanding he might have avoided the necessity by escape before that time. We do not hesitate to say he would have been justifiable in taking the life of Burkhalter and Leith, if there had been no other way open to enable him to avoid the necessity of taking the life of an innocent man. The charge requested was erroneous and misleading, in the respect that it ignored the law and evidence in these respects.

The second charge requested was properly refused. We suppose the principle asserted is exactly the contrary of that intended. By the use and position of the negatives the charge is made to assert that unless there was a present impending necessity to strike, there could be no murder.

There is no error in the record.

It appearing that the day appointed for the execution of the sentence has passed, it is considered and ordered that Friday, the 10th day of March next (1893), be and is hereby appointed and specified for the execution of the sentence of the law pro-

nounced by the trial court, and the sheriff or his deputy, or the officer acting in his place, must execute the sentence.

Affirmed.

Arp v. State, 19 L. R. A. 357 and note; *Sanders v. State*, 26 S. W. 62; *U. S. v. Vigol*, 2 Dall 345; *U. S. v. Haskel*, 4 Wash. C. C. 402; *Com. v. Hadley*, 52 Mass. 66; *Com. v. Drew*, 57 Mass. 279; *People v. Richmond*, 29 Cal. 414; *Bain v. State*, 67 Miss. 557; *McCoy v. State*, 78 Ga. 490; *Clark*, p. 73; *Bishop I.*, Sec. 346; *Wharton*, Sec. 94.

NOTE.—In Minnesota by statute, if the crime is not murder and the act is done under the reasonable apprehension of an instantaneous death, it is a defence. Minn. Stat. 1894, Sec. 6307; see N. Y. Penal Code, Sec. 25.

NOTE.—At common law married women committing crimes other than treason or murder in the presence of their husbands, were presumed to be coerced, which presumption was in many cases held to be conclusive. The modern doctrine is that this presumption may be rebutted; and some States, notably New York and Minnesota, declare by statute that it is no defense for married women that their criminal acts were done in the presence of their husbands. Minn. Stat. 1894, Sec. 6306; N. Y. Penal Code, Sec. 24.

Bishop I., Sec. 356; *Wharton*, Sec. 94 a. 78; *Hawley & McGregor*, p. 2.

State v. Fitzgerald, 49 Ia. 260; *Bibb v. State*, 94 Ala. 31; *Com. v. Neal*, 10 Mass. 152; *Seller v. People*, 77 N. Y. 411; *Reg. v. Smith*, 8 Cox C. C. 27; *People v. Wright*, 38 Mich. 744; *Reg. v. Dyker*, 15 Cox C. C. 771.

f.

Necessity.

An overwhelming necessity, destroying the free agency of the actor, relieves the act of its criminality; but one in order to save his own life can never take the life of another who is not doing an unlawful act.

REGINA v. DUDLEY.

Queen's Bench Division, 1884.

14 Q. B. D. 273.

INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty.

At the trial before Huddleston, B., at the Devon and Cornwall

Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated "that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner, Dudley, proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner, Stephens, agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite

helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner, Dudley, offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the threemen fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

LORD COLERIDGE, C. J. The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother Huddleston at Exeter on the 6th of November, and, under the direction of my learned Brother, the jury returned a special verdict, the legal effect of

which has been argued before us, and on which we are now to pronounce judgment.

The special verdict as, after certain objections by Mr. Collins to which the Attorney General yielded, it is finally settled before us is as follows. [His Lordship read the special verdict as above set out.] From these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving him of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would probably not have survived," and that "the boy being in a much weaker condition was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to determine what is the legal consequence which follows from the facts which they have found.

Certain objections on points of form were taken by Mr. Collins before he came to argue the main point in the case. First it was contended that the conclusion of the special verdict as entered on the record, to the effect that the jury find their verdict in accordance, either way, with the judgment of the Court, was not put to them by my learned Brother, and that its forming part of the verdict on the record invalidated the whole verdict. But the answer is twofold—(1) that it is really what the jury meant, and

that it is but the clothing in legal phraseology of that which is already contained by necessary implication in their unquestioned finding, and (2) that it is a matter of the purest form, and that it appears from the precedents with which we have been furnished from the Crown Office, that this has been the form of special verdicts in Crown cases for upwards of a century at least.

Next it was objected that the record should have been brought into this Court by *certiorari*, and that in this case no writ of *certiorari* had issued. The fact is so; but the objection is groundless. Before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), as the courts of Oyer and Terminer and Gaol delivery were not parts of the Court of Queen's Bench, it was necessary that the Queen's Bench should issue its writ to bring before it a record not of its own, but of another Court. But by the 16th section of the Judicature Act, 1873, the courts of Oyer and Terminer and Gaol delivery are now made part of the High Court, and their jurisdiction is vested in it. An order of the Court has been made to bring the record from one part of the court into this chamber, which is another part of the same court; the record is here in obedience to that order; and we are all of opinion that the objection fails.

It was further objected that, according to the decision of the majority of the judges in the Franconia Case, there was no jurisdiction in the Court at Exeter to try these prisoners. But (1) in that case the prisoner was a German, who had committed the alleged offence as captain of a German ship; these prisoners were English seamen, the crew of an English yacht, cast away in a storm on the high seas, and escaping from her in an open boat; (2) the opinion of the minority in the Franconia Case has been since not only enacted but declared by Parliament to have been always the law; and (3) 17 & 18 Vict. c. 104, s. 267, is absolutely fatal to this objection. By that section it is enacted as follows:—"All offences against property or person committed in or at any place either ashore or afloat, out of her Majesty's dominions by any master seaman or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner

and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England." We are all therefore of opinion that this objection likewise must be overruled.

There remains to be considered the real question in the case—whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First it is said that it follows from various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever toward you or any one else. But if these definitions be looked at they will not be found to sustain this contention. The earliest in point of date is the passage cited to us from Bracton, who lived in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeve tells us, because he was supposed to mingle too much of the canonist and civilian with the commonlawyer. There is now no such feeling, but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal, and the crime of murder, it is expressly declared, may be committed *linguâ vel facto*; so that a man, like Hero "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense—the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards oneself. If, says Bracton, the necessity be *evitabilis, et evadere posset absque occisione, tunc erit reus homicidii*—words which show

clearly that he is thinking of physical danger from which escape may be possible, and that the *inevitabilis necessitas* of which he speaks as justifying homicide is a necessity of the same nature.

It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justified homicide is that only which has always been and is now considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale's Pleas of the Crown, p. 491). Again, he says that "the necessity which justifies homicide is of two kinds: (1) the necessity which is of a private nature; (2) the necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard, and this takes in these inquiries:—(1) What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds:—"As touching the first of these—viz., homicide in defence of a man's own life, which is usually styled *se defendendo*." It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called "self-defence." (Hale's Pleas of the Crown, i. 478.)

But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear. For in the chapter in which he deals with the exemption created by compulsion or necessity he thus expresses himself:—"If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector *cum debito moderamine inculpatæ tutelæ*." (Hale's Pleas of the Crown, vol. i. 51.)

But, further still, Lord Hale in the following chapter deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing; "theft is no theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same." "But," says Lord Hale, "I take it that here in England, that rule, at least by the laws of England, is false; and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is felony, and a crime by the laws of England punishable with death." (Hale, Pleas of the Crown, i. 54.) If, therefore, Lord Hale is clear—as he is—that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder?

It is satisfactory to find that another great authority, second, probably, only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of "homicide founded in necessity;" and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster "necessity and self-defence" (which he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace, of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it.

In East's Pleas of the Crown (i. 271) the whole chapter on homicide by necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them, and the conclusion is left by Sir Edward East entirely undetermined.

What is true of Sir Edward East is true also of Mr. Sergeant Hawkins. The whole of his chapter on justifiable homicide assumes that the only justifiable homicide of a private nature is the defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked

men and the single plank, with the significant expression from a careful writer, "It is said to be justifiable." So, too, Dalton c. 150, clearly considers necessity and self-defence in Sir Michael Foster's sense of that expression, to be convertible terms, though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own. And there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him even in self-defence, *cuncta prius tentanda*.

The passage in Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, showing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books, and adds no new authority, nor any fresh considerations.

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar, who communicated with my Brother Huddleston, to convey the authority (if it conveys so much) of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my Brother Stephen in his Digest, from Wharton on Homicide, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my Brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord

Mansfield in the case of *Rex v. Stratton and Others*, striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a Governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.

The one real authority of former time is Lord Bacon, who, in his commentary on the maxim, *necessitas inducit privilegium quoad jura privata*, lays down the law as follows:—"Necessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day.

There remains the authority of my Brother Stephen, who both in his *Digest* and in his *History of the Criminal Law*, uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been neces-

sary, we must with true deference have differed from him, but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which if he had been a member of the court he would have been unable to agree. Neither are we in conflict with any opinion expressed upon the subject by the learned persons who formed the commission for preparing the Criminal Code. They say on this subject:—

“We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.”

It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and if not, in what way they should be amended, but as it is we have, as they say, “to apply the principles of law to the circumstances of this particular case.”

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called “necessity.” But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice

it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the Birkenhead; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. *Necesse est ut eam, non ut vivam*, is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—

"So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to

exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was willful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.

U. S. v. Holmes, 1 Wall Jr. 1, 22; Rex v. Stratton, 21 Howell St. Tr. 1045; Respublica v. McCarty, 2 Dall 86; Oliver v. State, 17 Ala. 587; Dupree v. State, 33 Ala. 380; Kennedy v. Com., 14 Bush. 340; Com. v. Drum, 58 Pa. St. 1; Farris v. Com., 14 Bush. 362; Arp v. State, 12 So. Rep. 301; 19 L. R. A. 357; Clark, p. 73; Bishop L., 346; Wharton, Sec. 95; Hawley & McGregor, p. 2.

g.

Justification and Excuse.

(1) *Mistake of Fact.*

Mistake of fact excuses the offence.

STATE v. McDONALD.

Court of Appeals of Missouri, 1879.

7 Mo. App. 510.

LEWIS, P. J., delivered the opinion of the court.

The defendant, a car-driver and conductor on the Lindell Railway, was convicted in the Court of Criminal Correction of an assault and battery committed upon the person of Oscar

Wielns. The only question raised by the appeal is whether, when a passenger on a street-car has in fact paid his fare, the conductor is justified in forcibly ejecting him from the car, because he, the conductor, honestly believes that the passenger has not paid his fare, but persistently refuses so to do.

If this were a civil action for damages, there can be no question that the passenger, in the case stated, would be entitled to recover. When a passenger on a street-car has dropped his fare in the box provided and placed for that purpose, he has an absolute right to remain on the car, in an orderly manner, until it reaches his destination on the line of the railway. If the conductor, nevertheless, assuming that the fare is not paid, violates the passenger's right by putting him off the car, he manifestly does so at his peril, in so far as any question of indemnification may arise. If one willfully destroys my property, honestly believing it to be his own, it will be no defence, against my claim for indemnity, to say that he made a mistake about the ownership. The law protects me in my property against intentional wrong-doers. If in such case either party must suffer, it should, by every rule of fairness and common sense, be he who made the mistake, rather than the other. A peaceable citizen deprived of his rights in a public conveyance, and subjected to gross indignity besides, is not to be denied redress because the servant in charge was not sufficiently observant to know the true state of the case. The learned judge who heard this cause in the court below evidently recognized these general principles, but he erred in holding them applicable to a criminal prosecution. There is here no question of indemnity to the person injured. The only question is, has the defendant committed a crime against the peace and dignity of the State?

Crime cannot exist without a criminal intent. A man at midnight discovers an intruder on his premises, under circumstances which furnish reasonable cause to apprehend that a felony is in progress, or about to be perpetrated. He kills the supposed burglar, in the honest belief that nothing less will save his own life or property. It turns out that the intruder was innocent of any criminal purpose; yet his slayer has committed no crime, either in morals or in law, deserving punishment. The criminal intent was wanting. A person passes counterfeit money, being

ignorant of its character and honestly believing it to be genuine; the one who receives it may recover for the wrong done him, notwithstanding the innocent mistake of the passer. And yet an indictment against the passer of the money would fail, because he was guilty of no criminal intent. In the case before us, according to the facts stated, the defendant honestly believed that he was simply discharging his duty in putting off a passenger who refused to pay his fare, and therefore in so doing he committed no crime. The court erred in giving instructions in support of a contrary view, and in refusing instructions prayed for by the defendant which were in harmony with the principles herein declared.

The judgment is reversed and the cause remanded. All the judges concur.

Duncan v. State, 7 Humph. 148; *Squire v. State*, 46 Ind. 459; *Com. v. Mash*, 7 Metc. 472; *Stern v. State*, 53 Ga. 229; *Gordon v. State*, 52 Ala. 308; *U. S. v. Pearce*, 2 McLean 14; *Meyers v. State*, 1 Conn. 502; *Reich v. State*, 63 Ga. 616; *Goetz v. State*, 41 Ind. 162; *Crabtree v. State*, 30 Ohio St. 382; *Adler v. State*, 55 Ala. 16; *Robinsons v. State*, 63 Ind. 235; *Faulks v. State*, 39 Mich. 200; *Moore v. State*, 65 Ind. 382; *Kreamer v. State*, 106 Ind. 192; *Farback v. State*, 24 Ind. 77; *State v. Homes*, 17 Mo. 379; *State v. Bond*, 8 Ia. 540; *Com. v. Farren*, 9 Allen 489; *Clark*, p. 68; *Bishop I.*, Sec. 301; *Wharton*, 87; *Hawley & McGregor*, p. 30.

NOTE.—Ignorance of fact is admissible to negative particular intent.

Reg. v. Muscot, 10 Mod. 192, 195; *Scott v. Cook*, 1 Duval 314; *Rex v. De Beauvoir*, 7 Car. & P. 17; *State v. Lea*, 3 Ala. 602; *Reg. v. Moreau*, 11 Q. B. 1028; *Com. v. Cook*, 1 Rob. (Va.) 729.

(2) *Accident or Misadventure.*

One is not criminally responsible for a lawful act lawfully done, no matter what the consequences.

ANN v. THE STATE.

Supreme Court of Tennessee, 1850.

11 Humph. 159.

McKINNEY, J., delivered the opinion of the court.

The plaintiff in error was indicted jointly with another slave named Tom, in the Circuit Court of Williamson, for the murder

of Mary E. B. Marr, the infant child of their master and mistress. The jury acquitted Tom, and found the plaintiff in error guilty as charged in the indictment. The court refused to grant a new trial, and pronounced judgment of death upon the prisoner, from which an appeal in error has been prosecuted to this court. It is not necessary, in the view we have taken of the case, to state the evidence in detail; a mere outline will be sufficient to raise the questions of law presented for our determination, except the question in relation to the admissibility of the prisoner's confession.

The infant, of whose murder the prisoner stands convicted, was of extremely tender age, only five weeks old; and the death was caused by an over-dose of laudanum administered by the prisoner, without the knowledge of any one, and contrary to a general command, not to give the child anything whatever.

The prisoner is of immature age, being, at the time of the alleged murder, not over fifteen years. A day or two preceding the death of the infant, the prisoner was taken from the negro-quarter on the plantation and put in the house to serve in the capacity of nurse. On the day of the infant's death, Mrs. Marr went into another room to attend to some of her domestic affairs, leaving the child asleep in the cradle in care of the prisoner. She remained absent about fifteen minutes as she supposes, during which time the laudanum was administered. The child survived about four hours. A physician was immediately sent for, but did not arrive until about two hours after the laudanum was given, and his efforts to counteract its effect were unavailing. He states, that the death was caused by an over-dose of laudanum, and that half a drop was as large a dose as the infant could have borne.

The prisoner for some time denied having given laudanum to the infant. Her master was much excited; inflicted blows with his hand upon the prisoner; threatened to shoot her, but was induced to desist by the persuasion of his wife, and sent her off to the quarter, where she was put in chains around her body and neck. On Saturday evening after the death of the child, which happened on the preceding day, Nichols, the overseer of Marr, and Giles, the overseer of Perkins, who lived on an adjoining farm, went together after night to the house where the prisoner was confined. Giles states, that she was asked by him, "how she

came there;" seemed slow in speaking. Nichols told her to speak. She then said she had given laudanum to the baby and it had killed it. He then asked her how she came to do it? She said Tom had been at her to meet him out at night, and told her if she would give it laudanum it would sleep until she could get back; that she had asked him if it would hurt; he said no, he had given it many times to his wife Eliza, and it never hurt her." She was told, she had better come out and tell the truth—it would be better for her. She was asked if she would make the same statement before Tom, that she had made to witness and Nichols; she said she would. Witness and Nichols then went to Tom's house and took him into the house where prisoner was, and told her to tell her tale again. She said Tom had recommended her to give it, and it would make the baby sleep till she could get back; and she asked him if it would hurt. Tom denied all this. She said she thought she would try and see if it would make it sleep, and had poured some in her hand and given it. That since she had been chained, Tom had been there and told her she had given it wrong—that she ought to have put some brandy in it, and sweetened it, and warmed it, and then the child would not have died in several days; that he told her she must admit she had given it, but not to call his name or he would shorten her days. Tom denied all this." Witness further stated, that "in the first talk with her, he told it would be better for her to come out and tell the truth."

Nichols' statement of the prisoner's confession is somewhat different from that of Giles; but we have thought proper to take the latter as probably the more correct and reliable statement.

There is proof in the record of an improper intimacy having existed between Tom (who was of mature age) and the prisoner for some weeks previous to the removal of the latter from the quarter to the house. The witness, Nichols, speaks of one occasion when he detected them, but he says, "he passed on and said nothing, as it was no business of his, and he did not care what they did."

Judging from this avowal of the overseer, the morals of the slaves under his dominion were in bad keeping; and it is not much to be wondered at, that the prisoner—who was brought up at the quarter—had a more imperfect sense of the obligations of

morality and common decency than is even usual among those of her own caste and social condition.

The circuit judge, in his instructions to the jury—after stating the general definition of murder and malice, and laying down some general principles, the correctness of which is not questioned—said: “If Ann, the prisoner, by force poured laudanum into the mouth of Mary E. B. Marr, such act, unless excused or justified by the evidence, would amount to a battery, and she would be responsible in law for the natural effects of the laudanum although they may have been more serious than she designed or expected.”

“If Ann was the slave of Nicholas Marr, the witness, and was employed by him to attend to Mary E. B. Marr; and if she was ordered by her master not to administer any thing to the said Mary E. B. Marr; if she, without authority, willfully administered laudanum to said Mary, intending thereby to produce unnecessary sleep, and contrary to her expectations it caused death, she would be guilty of murder.”

The first question for our consideration is—was the confession of the prisoner—which was objected to—properly admitted as evidence to the jury? This is a question which admits of no discussion. All the authorities concur, that a confession, to be admissible as evidence, must have been freely and voluntarily made, and not under the influence of promises or threats. As to what is such a promise or threat as will exclude a confession, it is laid down, that saying to a prisoner it will be worse for him if he do not confess; or that it will be better for him if he do, is sufficient to exclude the confession. 2 East. P. C. 659. So where a surgeon called to see a prisoner charged with murder, said to her, “you are under suspicion of this, and you had better tell all you know,” the confession was held inadmissible. 4 C. and P. 387. So where it was said to the prisoner, “it would have been better if you had told at first,” the confession was rejected. 6 C. and P. 175. It would be a useless labor to multiply authorities upon a point in respect to which there is no substantial disagreement to be found in the books. Nor would it be more profitable to indulge in speculation as to the probable influence of such a promise or threat in a particular case; certainly not in the case of a timid girl, of tender age, ignorant and illiterate, a slave and

in chains, whose life had been threatened by her master, and against whom the hand of every one, even those of her own color and condition, seems to have been raised. In such case, and in all cases, the law presumes, and conclusively presumes, that an influence was exerted upon the mind of the prisoner, and, therefore, all inquiry upon the subject is precluded.

2d. The next question is, was the law correctly stated to the jury? We think not. The errors of the charge will be obvious from the mere statement of a few plain elementary principles.

To constitute the crime of murder by the common law, and by that law this case is to be governed, the killing must be with malice aforethought: no matter by which of the thousand means adequate to the destruction of life, the death may have been effected. Malice, in its legal sense, is the sole criterion by which murder is distinguished from every other species of homicide. The malice essential to constitute the crime of murder, however, is not confined to an intention to take away the life of the deceased; but includes an intent to do any unlawful act which may probably result in depriving the party of life. It is not, in the language of Blackstone, so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart; and it may be either express or implied in law. 4 Bl. Com. 199-200.

If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm, to particulars, or of mischief indiscriminately, fall where it may, and death ensue; against or beside the original intention of the party, it will be murder. But, if such mischievous intention do not appear (which is matter of fact to be collected from the circumstances), and the act was done heedlessly and incautiously, it will be manslaughter only. Foster 261. But, if the death ensue in the performance of a lawful act, it may amount either to murder, manslaughter, or misadventure, according to the circumstances by which it is accompanied. Ibid 262, 1 Hale, 472, 4. Bl. Com. 192.

These general principles apply as much to a case where death ensues by means of a medicine of poisonous qualities, as to any other species of homicide. It is true, that where one willfully poisons another, from such deliberate act the law presumes

malace, though no particular enmity can be proved (4 Bl. Com. 199). But this presumption may be displaced in a case of death from poison, as in other cases, by direct proof, or by the circumstances of the particular case.

If, as Blackstone says, the poison were willfully administered, that is, with intent that it should have the effect of destroying the life of the party: or if, in the language of Foster, the act were "done deliberately and with intention of mischief, or great bodily harm," and death ensue, it will be murder. But if it were not willful, and such deliberate mischievous intention do not appear; and the act was done heedlessly and incautiously, it will be only manslaughter at most.

Testing the charge by these familiar principles, it is manifestly incorrect in several respects. It assumes, that if the prisoner administered the laudanum in violation of her master's order, for the purpose of "producing unnecessary sleep," and death ensued, contrary to her intention, she is guilty of murder. This is not law. In the first place, the charge puts the disobedience to the master's order, on the same footing with a violation of a command or prohibition of the law. This is a great mistake. Such violation of the master's order, is not an "unlawful act" in the sense of the rule above stated. It is no offence against the law of the land: nor is it cognizable by any tribunal created by law. It is an offence simply against the private authority of the master, and is cognizable and punishable alone in the domestic forum. Again: the criminality of the act is made to depend upon an intent, with reference to the deceased infant, which may be in law, if not positively innocent, at least comparatively so.

The laudanum may have been given by the prisoner in utter ignorance of the fact that it possessed any poisonous quality; and there may have been a total absence of any intention to do serious injury, or indeed injury of any sort, much less to destroy the life of the child. If the prisoner's purpose really was, to superinduce a state of temporary quietude or sleep, without more, in order to afford better opportunity, or greater facility, for carrying on her own illicit intercourse with Tom, this, however culpable in morals, would not involve her in the guilt of murder.

The tenderest of mothers might administer laudanum to her infant incautiously, in order to be enabled to attend to some

pressing call of her household affairs, which admitted of no delay: or a gay and thoughtless matron, devoted to the pursuit of pleasure, though not devoid of natural affection for her infant, might give a similar dose in order to have opportunity to attend the theatre or ball-room for a time. And although in both the latter cases the motive, so far as respects the actors, is different, and less offensive to morals or propriety, yet the purpose or intention, with reference to the effect to be produced upon the child, is the same, in kind at least, that is, in the language of the charge, to "produce unnecessary sleep." And yet, perhaps, no one would contend that, had death ensued, in either case, the mother would have been guilty of either murder or manslaughter.

In the case of the prisoner, her relation as a slave, taken in connection with her disregard of her master's positive direction, and the gross heedlessness and incautiousness of the act, might constitute her offence manslaughter, but certainly nothing more.

The charge of the court then, is not only erroneous in excluding from the consideration of the jury, the questions of fact, whether or not the prisoner had knowledge of the poisonous quality of laudanum, and whether or not there existed in the mind of the prisoner an intent to kill, or to do serious injury to the deceased; but likewise, in not submitting it to the jury to determine the grade of offence, whether murder or manslaughter.

If the offence amounted to no more than manslaughter, as we hold to be clear, then the Circuit Court had no jurisdiction of the case.

In the case of *Nelson, a slave, v. the State*, at the last Term at Jackson, it was held that, by our law, manslaughter might be committed by a slave; but that the Circuit Court had no jurisdiction of such case. In delivering the judgment of the court in that case, Judge Green says, it is true, an indictment against a slave for murder, does not include a charge of manslaughter, because by the act of 1819, ch. 35, sec. 1, murder, committed by a slave, is declared to be capital, and by the act of 1835, ch. 19, sec. 9, exclusive original jurisdiction is given to the Circuit Courts, of all offences committed by slaves, which are punishable

with death: and as manslaughter is not so punishable, the Circuit Court has no jurisdiction thereof.

By the act of 1815, ch. 138 (2 Scott's Rev. 246-247), a special tribunal, consisting of three justices and nine freeholders and slaveholders, is created for the trial of all offences committed by slaves, that are not capital, with authority to "pass such judgment, according to their discretion, as the nature of the crime or offence shall require," not affecting life or limb. By the act of 1819, ch. 35, sec. 1, murder, arson, burglary, rape, and robbery, when committed by slaves, are declared capital, and to be punished with death; and all other offences are to be punished as theretofore, provided, however, that such punishment shall not extend to life or limb.

The judgment of the Circuit Court will be reversed.

Plummer v. State, 4 Tex. Ct. App. 310; U. S. v. Meagher, 37 Fed. Rep. 875; State v. Benham, 23 Ia. 154; Duncan v. State, 7 Humph. 148; McPherson v. State, 22 Ga. 478; Com. v. Campbell, 7 Allen 154; Rice v. State, 8 Mo. 561; Rex v. Macleod, 12 Cox C. C. 534; Robertson v. State, 2 Lea 239; Rex v. Waters, 6 C. & P. 328; Butler v. State, 19 S. E. 51; Rex v. Van Butchell, 3 Car. & P. 629; N. Y. Penal Code, 203; Clark, p. 71; Wharton, Sec. 169; Hawley & McGregor, p. 135.

(3) *Defence.*

(a) Of Self.

One may defend himself, or those dependent upon him, in a reasonable and necessary manner, even to the extent of taking life.

STATE v. BURKE.

Supreme Court of Iowa, 1870.

301 Ia. 331; 33 Atl. 257.

MILLER, J. That the deceased, Henry Guyer, came to his death by reason of a blow inflicted by the defendant with a club or stick of wood is not questioned.

The defence insisted upon in the district court was, that the

blow was struck by the defendant in reasonable self-defence when attacked by the deceased and his brother, George Guyer.

The evidence shows that the defendant, the deceased, and several other persons were at the house of one Conrad Paul, on Sunday evening, November 21, 1869; that the defendant and George Guyer quarrelled, and the deceased interfered, taking his brother's side in the quarrel. Paul protested against their quarrelling in the house, and requested them to desist or go out.

This seemed to quiet the parties for a time, when it was proposed by some one of the company that they would go home, and they all went out of the house apparently for that purpose. It was then quite dark. When all were out of the house and a short distance therefrom, the quarrel between the defendant, deceased and George Guyer, was renewed, and a fight with clubs ensued, in which the defendant struck the blow that caused the death of Henry Guyer. The witnesses are not agreed as to who made the first attack. There was evidence tending to show that the Guyers made the first attack, and that the fight was forced by them on defendant. The medical witnesses testified that the skull of the deceased was much thinner than an ordinary human skull, and that a lighter blow would produce the injury found in the skull of deceased than on an ordinary skull.

On the trial the defendant's counsel requested the following instructions: "If the jury believe that George Guyer and deceased made the first attack upon the defendant, armed with clubs, from which he had reason to, and did, believe that he was in imminent danger of great bodily harm, it was lawful for him to resist such attack with a weapon of like character to that used by his assailants, and if in the use of such weapon, while exercising reasonable care to produce no greater injury than was necessary to protect himself from great bodily injury, he unintentionally gave a blow which would in ordinary cases have been no more than was necessary to repel the assault made upon him, but, which, by reason of the peculiar character of the skull of the deceased, or of the particular place where the blow happened to fall, did produce death, the defendant would not be guilty of the crime charged."

"If the jury believe that George Guyer and deceased, acting in concert and with the intention of inflicting great bodily injury

upon defendant, made an attack upon him, armed with clubs, and struck him the first blow, and that they were in such close proximity to him at the time of such attack that he could not retreat without danger of great bodily harm, then he had the right to resist such attack with a weapon of the same character as those used by his assailants, and if, in using such weapon, while exercising reasonable care to apply no more force than was necessary to repel the attack upon him, he accidentally and unintentionally gave a blow to his assailant which produced death, such act would not be criminal and the jury should not for that reason convict."

"If the jury believe that George Guyer and deceased, acting in concert and with the intention of inflicting great bodily harm upon defendant, attacked him with clubs, the defendant had the right to resist such attack with a weapon of like character, and if, in the necessary defence of his own person and without using any more force, or a more dangerous weapon than was being used against him, he inflicted a blow which he had reason to, and did, believe was necessary for his own protection, but which, unintentionally upon his part, produced death, such act would not be criminal and the jury should acquit."

The court refused each of these instructions, and gave the following, touching the right of self-defence.

"If the jury believe from the evidence that the defendant, without solicitation and against his will, was attacked by the deceased with a deadly weapon, and the attack was such as to create a fear of death in the mind of a person of ordinary courage and prudence, and did create such an apprehension in the mind of the defendant, then he would be justified in using a similiar weapon with prudence and caution in defending himself, and if you find from the evidence that in the exercise of such prudence and caution, and in reasonable fear of imminent danger to his own life, the defendant took the life of the deceased, you must find the defendant not guilty."

To the giving of this instruction, and in refusing those asked by the defendant, proper exceptions were taken.

There was error in these rulings of the court. By refusing the instructions asked by the defendant and giving the above, the court denied the defendant the benefit of the plea of self-defence

if he took his assailant's life to save himself from imminent danger of great bodily injury. The law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from great bodily harm, as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault. It was expressly so held by this court in the case of *The State v. Benham*, 23 Iowa, 154, 162. The same view is supported in the following cases: *The State v. Thompson*, 9 Iowa, 188; *The State v. Decklots*, 19 id. 447; *The State v. Neely*, 20 id. 108; *The State v. Kennedy*, id. 569.

The judgment of the district court is reversed and a new trial ordered.

Reversed.

STATE v. PEO.

Court of Oyer and Terminer of Delaware, 1889.

9 Houston, 488.

COMEGYS, C. J., charging the jury:

Gentlemen of the Jury: The instructions prayed for by the Attorney General, and the prisoner's counsel, make it necessary that the court should deliver to you a more formal charge than would otherwise be made—although the testimony laid before you on each side discloses a case differing in its facts from any hitherto tried in this State. As I do not purpose going over the testimony in detail, it will be sufficient I think to say, with respect to it, that it shows a fight between the prisoner and the deceased at or about the corner of Front and Market streets in this city, which had its origin, either in words, or personal violence, or both, upon the sidewalk in front of the prisoner's store and peanut stand at the northeast corner where those streets intersect each other, or in the store itself. The one thing certain, as I think I may say, is that for some reason or other, which you may gather from the testimony on both sides, a fight took place between the deceased and the prisoner, which was begun by one or the other of the combatants—the State's witnesses or those who spoke to that point supporting the theory that the

first assault was by the prisoner; while those for the defence, who speak of the beginning of the affray, say it commenced by the act of the deceased in violently seizing the prisoner by the throat in his store, after using a very opprobrious epithet about him. However, the fight began, it became a mutual combat, both of them participating in it—the State contending that the deceased was in no sense the aggressor, but that the prisoner was: while, on the other side, it is claimed that the first assailant was the deceased; and that throughout the prisoner was strictly on the defensive, endeavoring to avoid collision with his opponent, or to escape it after it ensued. The conflict of testimony on this point, as upon all others in this trial, I submit to you to decide upon, as it is not within the province of this court to do so, or more than to instruct how you shall decide a conflict wherever it occurs. Where there is opposing testimony upon a material point in a cause, the jury must examine the proof carefully, and give credit to that which under all the circumstances seems to them entitled to the most weight. In doing this they take into consideration the number and character of the witnesses on both sides, their intelligence, apparent freedom from bias, or prejudice, their means of observation, and concurrence in statement; and where there seems to be better reason to rely upon those of one side than the other, then there exists greater weight of testimony on the part of the former—preponderance of proof as it is called—and the jury should yield its credence to the testimony of that side. But it should always be kept in mind that this rule does not apply to all the aggregate of the testimony on both sides; for if it did, a person accused and on trial, might be convicted upon the weight of testimony alone, whereas this is never to be done; nothing being sufficient to warrant a conviction of a prisoner, but entire satisfaction on the part of the jury beyond a reasonable doubt, that he is guilty. It must not be only that the weight of the proof is against the prisoner, but that it also so preponderates over, or outweighs that on his part, as to leave no reasonable doubt of his guilt of the crime imputed to him.

After this contest had commenced, the deceased and the prisoner got out into the street in the strife between them, and soon afterwards the deceased overcame the prisoner and threw him on the pavement of the street and on an iron gutter cover in

it, with great violence, according to the prisoner's witnesses, or some of them, and held him down so firmly that, according to one of them, it took three or four men to take him away from the deceased. After they were separated, it was found that the deceased had received a mortal stab from the pick which the prisoner used at his store in his sale of dates, and which he had in his hand at the time the deceased was taken from off him. There seems no room for doubt that during the whole time of the affray outside the prisoner's store, he had the pick in his hands; for he never got back into the store from the time the contest began until it ended where the parties fell, with the deceased on top of him. By the testimony of the prisoner's witnesses, it is stated, that the deceased was a large, powerful man, much the physical superior of the prisoner. By the testimony of the State's witnesses, speaking to the point, it would seem that the deceased from the first was rather in the character of a defender of his person from the attempts of the prisoner to stab him with the pick, and that for such purpose, he kept backing away from him, but the prisoner's witnesses state the contrary of this, and say that the deceased was the assailant in the whole contest, and that the pick was used by the prisoner by pushing the deceased back with the butt of the handle, except, as Mr. Scott testifies after the deceased had repeatedly kicked the prisoner when he seemed to be endeavoring to avoid further contest by returning to his store, and only then he turned around and struck him with the pick on the head.

With this concise, and I hope sufficient reference to the facts testified to before you—for they are all fresh in your mind and need no rehearsal by me, I shall proceed to point out to you the law in cases of homicide, and leave you to apply such of it as has relevancy to the facts which you may deem sufficiently proved, and thus make up your verdict. I shall treat of that law in the inverse order of the instructions prayed for by the Attorney General, because I think it is capable of greater simplicity of exposition, in this case, in that way.

Every killing by one man of another is homicide. It is criminal or not, according to circumstances. There are some homicides, which are justifiable, others excusable, and others which are neither, but are felonious and punishable according

to their quality. With the justifiable homicides we have nothing to do in this case and therefore I shall say nothing about them. I shall deal with felonious homicides, and with those excusable on the ground of self-defence.

Felonious homicides are murder and manslaughter. They again are divided into such as are malicious and those which are not. Malice is of the very essence of murder, and therefore no homicide is murder unless it is committed maliciously; but man-slaughters are not malicious crimes; and that only is what distinguishes them from murders. Originally only one class of murders was known to our law. But the Legislature by the Code of 1852, divided the crime of murder into two classes, describing one of them and calling it murder of the first degree, and classing all others as murder of the second degree. Murder itself (which includes both degrees) is the unlawful and felonious killing by one man of another with malice aforethought—which means malice preconceived. That is engendered before the act done. If that malice be express, then the offence is murder of the first degree; if it be not express, but is implied by law from the nature of the act done, it is murder of the second degree. Express malice exists where one, with sedate and deliberate mind and formed design, kills another. This state of mind and purpose are usually shown by the deliberate selection and use of a deadly weapon knowing it to be such, a preconcerted hostile meeting whether in a regular duel, or street fight—mutually agreed upon, or notified and threatened by the prisoner, privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like. Malice implied in law is an inference or conclusion of law upon the facts found by the jury, and among these the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in some other felonious or unlawful act from which the law raises the presumption of malice. As if one attempts to kill or maim A, and in the attempt by accident kills B, a dear friend, or child; or if in a riot or street fight, one of the parties accidentally kills a third person who interfered to part the combatants and preserve the peace—the law implies malice, and the slayer is guilty of murder. Other examples are given in the

books; but it is sufficient to say, that all malicious homicides other than those committed with express malice aforethought, are murders of the second degree. The legal definition of malice is—that it is a general malignity and recklessness of the lives and persons of individuals which proceed from a heart void of a just sense of social duty and fatally bent on mischief. And wherever the fatal act is committed deliberately or without adequate provocation, the law presumes that it was done in malice; and it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to murder. I have already shown to you how express malice is shown; and have stated that implied malice appears otherwise.

Manslaughter, as I have said, is not a malicious crime. It usually grows out of a sudden contest, or affray, between parties mutually contending, and where one in the heat of blood slays his adversary. If the fatal stroke be with a deadly weapon, the homicide will be murder, if it appear that the slayer provided himself with it beforehand to be used in the encounter. All homicides with a deadly weapon, or an instrument likely to produce death are presumed in law to be malicious; to save them from that inference, the prisoner must make it appear to the satisfaction of the jury, that his possession of such weapon or instrument was not a preparatory one for the conflict.

The law of self-defence is this—that when one is suddenly assailed by another in such a manner as to endanger his life, or to do him some great bodily harm, and he cannot escape the fury of his assailant otherwise than by taking his life, he may kill him. But before he can do this, he must do all he can to escape from the fury of his assailant, and may never take his life, except in the last extremity and where no other means for his safety are available to him. And the same is true, where two persons are engaged in a fight and one of them endeavor to withdraw from it and do what he can for that purpose, and yet he cannot do so by reason of the hostile opposition of his adversary, and to continue it would result in death or great bodily harm to him, he may take the life of such adversary to preserve his own, or protect his person from such harm.

I have now given you, gentlemen, all the law that we think

will aid you in deciding this case; and in doing so have answered affirmatively the main points, or prayers, of the Attorney General. In fact there is in this case no controversy as to the law. With respect to the defence suggested by the learned counsel for the prisoner, that there is ground for the theory that the deceased accidentally fell upon the prisoner's weapon, and was not struck by him with it, we think it only necessary to say—that we have heard no fact proved that points to such conclusion. But if such was proved, it cannot avail the prisoner unless he was at the time using it lawfully in self-defence: if used otherwise, it would be an unlawful use, and subject him to the penal consequences of manslaughter at least.

The case is now submitted to you, gentlemen, upon the law, as we have delivered it to you, and the facts related by the witnesses, and we have confidence you will well consider it, and that your verdict will be entirely satisfactory to your consciences. It remains but to add the instructions asked for by the prisoner's counsel—that the prisoner cannot be convicted of any crime, unless you are satisfied by the proof in the case, beyond a reasonable doubt, that he is guilty of it.

A word more—in all indictments for murder of the first degree, as that in this case is, the jury may convict of that crime, or of murder in the second degree, or of manslaughter, as the evidence may warrant a conviction of a particular offence. If it do not so warrant, they are bound to acquit entirely.

Verdict, not guilty.

Campbell v. State, 16 Ill. 17; Erwin v. State, 29 Ohio St. 186; Creek v. State, 24 Ind. 151; People v. Lynch, 35 Pac. 860; Jones v. State, 26 Tex. App. 1; Floyd v. State, 36 Ga. 91; Meurer v. State, 129 Ind. 587; Long v. State, 52 Miss. 23; Silvus v. State, 22 Ohio St. 90; Enright v. People, 155 Ill. 32; Hathaway v. State, 32 Fla. 56; State v. Sortor, 52 Kas. 531; Downey v. State, 26 S. W. 627; State v. Kirkman, 59 N. W. 24; *In re* Neagle, 14 Sawyer 232; Lovett v. State, 17 L. R. A. 705; Wilson v. State, 17 L. R. A. 654; Smith v. State, 25 Fla. 517; Pinder v. State, 27 Fla. 370; N. Y. Penal Code, Sec. 26; Clark, p. 149; Bishop I., 864-874; Wharton, 95-103; Hawley & McGregor, 131; The Penal Code of Pa.; Shields, vol. I., 387, 392, 399, 403, 404, 406, 416, 418, 436.

(b) Of Property.

(1¹) In General.

One may defend his property in any reasonable and necessary manner short of taking life.

STOREY *v.* STATE.

Supreme Court of Alabama, 1882.

71 Ala. 329.

SOMERVILLE, J. The judgment of conviction in this case must be reversed because of several errors apparent in the record.

It is one of the fundamental principles of the law of homicide, whenever the doctrine of self-defence arises, that the accused himself must always be reasonably free from fault, in having provoked or brought on the difficulty in which the killing was perpetrated. If the accused was the aggressor, it is well settled that he can not be heard to urge, in his own justification, a necessity for the killing which was produced by his own wrongful act.—Cross' Case, 63 Ala. 40; Kimbrough's Case, 62 Ala. 248; Whart. on Hom. Sec. 535. Or, as sometimes stated, no one can avail himself of a necessity which he has knowingly and willfully brought on himself.—Leonard's Case, 66 Ala. 461; 1 Bish. Cr. Law, Sec. 844. Many of the numerous charges requested by the prisoner, as will readily appear from inspection, were properly refused on the ground that they ignored this preliminary principle.

It is another important rule in such cases, that the right of self-defence does not arise until the defendant has availed himself of all proper means in his power to decline the combat by retreat, provided there be open to him a safe mode of escape. Ingram's Case, 67 Ala. 67; Eiland's Case, 52 Ala. 322. Such, at least, is the settled principle governing cases of mere assault, or of mutual combat, where the attacking party, as expressed by Mr. Bishop, has not "the purpose of murder in his heart."—1

Bish. Cr. Law, Sec. 850. Where, however, the assault is manifestly felonious in its purpose and forcible in its nature, as in murder, rape, robbery, burglary, and the like, as distinguished from secret felonies, like mere larceny from the person, or the picking of one's pocket, the party attacked is under no obligation to retreat. But he may, if necessary, stand his ground and kill his adversary.—Cases on Self-Defence (Horr. & Thomp.), pp. 33, 133, 139; Selfridge's Case, *Ib.* 1; State v. Shippey, 10 Minn. 223; 1 Bish. Cr. Law, Sec. 850; Aaron v. The State, 31 Ga. 167; 1 East P. C. 271. Mr. Bishop observes, that "it is the same where the attack is with a deadly weapon; for, in this case, the person attacked may well assume that the other intends murder, whether he does in fact or not."—1 Bish. Cr. L. Sec. 850. This observation, however, must be limited to those cases where the attack with the deadly weapon is made under such circumstances or surroundings as to reasonably justify the conclusion that the party assailed, by retreating, will apparently put himself at a disadvantage; for, as Mr. Blackstone has it, he should retreat "as far as he conveniently and safely can to avoid the violence of the assault, before he turns on his assailant."—4 Com. 184; Whart. on Hom. Sec. 485; Selfridge's Case, *supra*; Cases on Self-Defence, 64, 121, 130. Mr. East states the doctrine as follows: "A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends, or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence."—1 East P. C. 271.

Of course, where one is attacked in his own dwelling-house, he is never required to retreat. His "house is his castle," and the law permits him to protect its sanctity from every unlawful invasion.—Whart. on Hom. Sec. 541; Pond's Case, 8 Mich. 150; 1 Russ. Cr. 544.

These principles ore of easy application to the evidence, and some of the scharges were misleading in failing to clearly recognize them.

The law requires that the circumstances surrounding the

prisoner should have created in his mind a reasonable belief of his own imminent peril, and of an urgent necessity to take the life of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction of great bodily harm. Such peril must be, to all appearances, present and immediate, and the belief in the necessity of killing must be well founded and honestly entertained; and of these facts the jury must be the judge.—Carroll's Case, 23 Ala. 28; Oliver's Case, 17 Ala. 587; *Ex parte* Brown, 65 Ala. 446; Cases on Self-Defence (Horr. & Thomp.), 345, 349, 476, 820; Whart. on Hom. Sec. 517 *et seq.*; Mitchell's Case, 60 Ala. 26; Robert's Case, 68 Ala. 156.

The charges given by the court fully recognize this principle.

The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less a felonious homicide.—Street *v.* Sinclair, *ante*, p. 110; Burns *v.* Campbell, *ante*, p. 271.

Taking the hypothesis that there was a larceny of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a felony in this State, being specially made so by statute, without regard to the value of the animal stolen.—Code, 1876, Sec. 4358. The fifth charge requested by the defendant is an assertion of the proposition, that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented, as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute—a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common law jurisprudence. The broad doctrine intimated by Lord Coke was, that a felon may be killed to prevent the commission

of a felony without any inevitable cause, or as a matter of mere choice with the slayer.—3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be, that “where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.”—4 Com. 181. The reason he assigns is, that the law is too tender of the public peace and too careful of the lives of the subjects to “suffer, with impunity, any crime to be prevented by death, unless the same, if committed, would also be punished by death.” It must be admitted that there was far more reason in this rule than the one intimated by Lord Coke, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing can not be done from mere choice; and it is none the less certain that the felony need not be a capital one to come within the scope of the rule.—*Gray v. Combs*, 7 J. J. Marsh. 478; *Cases on Self-Defence* (Horr. & Thomp.), 725, 867; *Oliver v. The State*, 17 Ala. 587; *Carroll v. The State*, 23 Ala. 28.

We find it often stated, in general terms, both by text writers and in many well considered cases, that one may, as Mr. Bishop expresses it, “oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon’s existence.”—1 Bish. Cr. Law, Secs. 849-50; *The State v. Rutherford*, 1 Hawks, 457. It is observed by Mr. Bishop, who is an advocate of this theory, that “the practical carrying out of the right thus conceded, is, in some circumstances, dangerous, and wherever admitted, it should be carefully guarded.”—1 Bish. Cr. Law, Sec. 855.

After a careful consideration of the subject we are fully persuaded that the rule, as thus stated, is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force.—Whart. on Hom. Sec. 539. Mr. Greenleaf confines it to “the prevention of any atrocious crime at-

tempted to be committed by force; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person" (3 Greenl. Ev. 115); and such seems to be the general expression of the common law text writers.—1 Russ. Cr. 665-70; 4 Black. Com. 178-80; Whart. Amer. Cr. Law, 298-403; 1 East P. C. 271; 1 Hale, P. C. 488; Foster, 274. It is said by the authors of Cases on Self-Defence, that a killing which "appears to be reasonably necessary to prevent a forcible and atrocious felony against property, is justifiable homicide." "This rule," it is added, "the common law writers do not extend to secret felonies, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defence of property does not extend to cases of larceny, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value."—Cases on Self-Defence (Horr. & Thomp.), 901-2. This was settled in *Reg. v. Murphy*, 2 Crawf. & Dix C. C. 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor, the shooting being done very clearly to prevent the act, which was admitted to be a felony. Doherty, C. J., said: "I can not allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." This view is supported by the following cases: *State v. Vance*, 17 Iowa, 144; *McClelland v. Kay*, 14 B. Monroe, 106, and others not necessary to be cited. See Cases on Self-Defence, p. 901, note.

There is no decision of this court, within our knowledge, which conflicts with these views. It is true the rule has been extended to statutory felonies, as well as felonies at common law, which is doubtless the correct doctrine, but the cases adjudged have been open crimes committed by force, and not those of a secret nature.—*Oliver's Case*, 17 Ala. 587; *Carroll's Case*, 23 Ala. 28; *Dill's Case*, 25 Ala. 15.

In *Pond v. The People*, 8 Mich. 150, after endorsing the rule which we have above stated, it was suggested by Campbell, J., that there might possibly be some "exceptional cases" not within

its influence, a proposition from which we are not prepared to dissent. And again in *Gray v. Combs*, 7 J. J. Marsh. 478, 483, it was said by Nicholas, J., that the right to kill in order to prevent the perpetration of crime should depend "more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached by law." There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the night time, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing, in each instance, the thief to be killed when necessary, if taken in the act.—4 Black. Com. 180, 181.

The alleged larceny in the present case, if it occurred at all, was in the open daylight, and the defendant is not shown to have been unable to obtain his redress at law. Where opportunity is afforded to secure the punishment of the offender by due course of law, the case must be an urgent one which excuses a killing to prevent any felony, much less one not of a forcible or atrocious nature.—Whart. Hom. Secs. 536-8. "No man, under the protection of the law," says Sir Michael Foster, "is to be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort."—Foster, 296. It is everywhere settled that the law will not justify a homicide which is perpetrated in resisting a mere civil trespass upon one's premises or property, unaccompanied by force, or felonious intent.—Carroll's Case, 23 Ala. 28; Clark's Man. Cr. Law, Secs. 355-7; Whart. on Hom. Sec. 540. The reason is that the preservation of human life is of more importance than the protection of property. The law may afford ample indemnity for the loss of the one, while it utterly fails to do so for the other.

The rule we have above declared is the safer one, because it better comports with the public tranquillity and the peace of society. The establishment of any other would lead to disorderly breaches of the peace of an aggravated nature, and therefore tend greatly to cheapen human life. This is especially true in view of our legislative policy which has recently brought many

crimes, formerly classed and punished as petit larcenies within the class of statutory felonies. It seems settled that no distinction can be made between statutory and common law felonies, whatever may be the acknowledged extent of the rule. *Oliver's Case*, 17 Ala. 587; *Cases on Self-Defence* 901, 867; *Bish. Stat. Cr. Sec. 139*. The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is "a part of any outstanding crop."—Code, Sec. 4358; Acts 1880-81, p. 47. It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a willful homicide in order to prevent the larceny of an ear of corn. In our judgment the fifth charge, requested by the defendant, was properly refused.

It can not be questioned, however, that if there was in truth a larceny of the prisoner's horse, he, or any other private person had a lawful right to pursue the thief for the purpose of arresting him, and of recapturing the stolen property.—Code, Secs. 4668-70; 1 *Bish. Cr. Proc. Secs. 164-5*. He is not required, in such case, to inform the party fleeing of his purpose to arrest him, as in ordinary cases.—Code, Sec. 4669. And he could, if resisted, repel force with force, and need not give back, or retreat. If, under such circumstances, the party making resistance is unavoidably killed, the homicide would be justifiable.—2 *Bish. Cr. Law, Sec. 647*; 1 *Russ. Cr. 665*; *State v. Roane*, 2 Dev. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretence of pursuit, as a mere colorable device, beneath which to perpetrate crime.

The character of the deceased was clearly a vital issue, as it is in all cases where an issue of self-defence properly arises. It was relevant as having a tendency to justify the belief in the prisoner's mind of a peril enhanced by the dangerous character of his assailant. A ferocious, vindictive and turbulent man is reputed to be such, because of the frequency with which he executes his revenge, or gives expression, by constant overt acts, to his animosity. A demonstration on his part, especially when preceded

by recent and violent threats, may create reasonable apprehension of danger, when the same conduct on the part of a notoriously peaceable or timid man would be regarded as entirely harmless. It is quite true that no one can, without lawful excuse, kill a blood-thirsty ruffian any more than he can the most orderly citizen; but it is plain that an overt act done by the former may reasonably justify prompter action, as a necessary means of self-preservation, than if done by the latter. It may sometimes be as material to prove that a man, who assailed you, was a Thug in character, as that he was a Thug in reality.—Whart. on Hom. Sec. 606; *Robert's Case*, 68 Ala. 156; *Pritchett's Case*, 22 Ala. 39; *Dupree v. State*, 33 Ala. 38; *Franklin's Case*, 29 Ala. 14; *Stokes' Case*, 53 N. Y. 164; *Colton's Case*, 31 Miss. 504; *Cases Self-Defence* (Horr. & Thomp.), pp. 486, 667, 641, 635, 927, 539.

There are some other questions raised in the record which we do not think necessary to discuss. The judgment of the Circuit Court must be reversed, and the cause remanded for a new trial. In the meanwhile, the prisoner will be retained in custody until discharged by due process of law.

Com. v. McLaughlin, 163 Pa. St. 651; *State v. Thompson*, 9 Ia. 188; *State v. Kennedy*, 20 Ia. 569; *State v. Benham*, 23 Ia. 154; *Filkins v. People*, 69 N. Y. 101; *State v. Gilman*, 69 Me. 169; *State v. Moore*, 31 Conn. 479; *Com. v. Clark*, 2 Met. (Mass.) 23; *Com. v. Kennard*, 8 Pick. (Mass.) 135; *Souther v. State*, 18 Tex. App. 352; *Anderson & Austin v. State*, 6 Baxt. 608; *Roach v. State*, 77 Ill. 25; *Clark*, p. 144; *Bishop I.*, Sec. 536-875, 876; *Wharton*, Sec. 100; *Hawley & McGregor*, p. 135.

(2¹) Of Habitation.

One may defend his habitation with such means as is reasonable and necessary even to the extent of taking life.

WRIGHT v. COMMONWEALTH.

Court of Appeals of Kentucky, 1887.

85 Ky. 124; 2 S. W. 904.

JUDGE LEWIS delivered the opinion of the court.

Appellant having, under a joint indictment against him and his brother, Elijah Wright, for the murder of William Wright,

been convicted of manslaughter and sentenced to the penitentiary for twenty-one years, appeals.

The homicide occurred between nine and ten o'clock at night, on the premises of appellant, near his dwelling-house, where the deceased, who was his uncle, had gone, accompanied by ten others, all but four being relatives and two of them brothers of appellant. It appears that all the party, except the deceased and one other, was armed with guns or pistols, and by agreement, when near the house, divided, two or three going to the back and the others to the front door; and their approach was so noisy and demonstrative as to awaken those inside, all of whom had gone to bed. One of those who went to the back door was a brother of appellant called "Black Hawk," who said in a loud angry tone, "Damn you, open the door," adding significantly, "Black Hawk is here now." The reply of the appellant was, "Damn you, open the door yourself if you want it opened." And upon the same response being given to the second demand made with a threat to kick the door down, it was kicked down, the shutter falling inside upon a man named Johnson, who was sleeping on the floor. The inmates of the house at the time were appellant, his wife, five children, Elijah Wright, who was there for the night, and Johnson. When the door was thus forced open appellant was confronted by his brother, "Black Hawk," with a gun presented, and Elijah by another called Lunce Wright, likewise armed.

The evidence tends to show the first shot was fired by Elijah at Lunce Wright, the shooting between the two beginning soon after the door was broken. But it clearly appears that appellant did not attempt to shoot until two or three shots had been fired in his house, one of them being aimed directly at him by "Black Hawk," whom he then shot at and wounded. As soon as the latter was shot he called on the crowd to rush up, whereupon appellant cried out for God's sake to stop firing into his house, as they had already killed one of his children. This, however, turned out not to be true, though amidst the noise and confusion caused by the firing and screaming and crying of his wife and children, appellant might have reasonably supposed one or more of them was killed. Perdue, one of the crowd, then called on them to fall back and give the woman and children a chance to get

out, and the party did then fall back toward the corn-crib, forty or fifty feet, where they stopped, still facing the house. Soon after that, appellant having been told by Elijah that the party outside were reloading their guns, and directed to load his quick, went outside the house in his night clothes, and from the chimney corner fired the shot that killed William Wright.

The proof is that it was a moonlight night, the snow was on the ground, and that appellant, Wright, had recognized the deceased at the time he fired. On the other hand, while it is only an inference, though a strong one, that any others of the party besides the two at the back door, fired into the house before they fell back to the corn-crib, it is proved that about the time appellant shot from the chimney corner, firing was going on, as the witnesses say, in all directions, at least two shots being in the direction of the house. One of these was fired by a person near the deceased, in the language of a witness, almost instantaneous with the one by appellant, the load striking the house near to him. The other was fired just before, from the same vicinity, by "Black Hawk," and by it Andrew Wright, one of the party coming from the house toward the corn-crib, was killed. That shot was evidently fired under the belief the person shot at was either appellant or Elijah Wright, for "Black Hawk" cried out with an oath, when Andrew Wright fell, that he had got one of them.

It appears that soon after the crowd fell back Elijah Wright fled from the house; but the precise time he left does not appear, though he fired and was fired at as he retreated, one of the persons firing at him being a justice of the peace.

It may be inferred that the ostensible purpose of the crowd in going to the house of appellant was to arrest Elijah Wright upon a charge of breach of the peace. One of them, the justice of the peace, testified he issued a warrant against him late in the evening of the day of the homicide, but the court excluded that testimony. So the only evidence before the jury that a warrant was issued at all, was by a witness, who stated he heard appellant and Elijah Wright talking about a warrant, and that the former told the latter if he would go home with him and stay all night they would not arrest him. And it is proper to state in this connection that the testimony of that witness tended to show

appellant intended to resist the arrest of his brother, if attempted at his house. But there was no officer except the justice of the peace in the party when they went to the house of appellant, and the only pretext of authority of any one of them to make an arrest, was the attempt of the justice of the peace to deputize Perdue, a private citizen, to do so.

There is no evidence that any one of the party informed Elijah Wright, when they reached the house, they came to arrest him, or that a warrant had been issued for his arrest; and it does not appear that either the justice of the peace or Perdue spoke to appellant or Elijah Wright at any time that night. The only intimation given to them that the object of the crowd in going there was to make the arrest, was by "Black Hawk," who said, when he went to the back door, "Consider yourselves under arrest," accompanied with the remark, "Damn you, open the door;" and only one witness, he who was aiding in breaking the door, testifies to that fact.

It is proper to state, as illustrative of the feelings and motives of some of the party, that the justice of the peace testifies his object in going to the house of appellant was to protect him and Elijah from being hurt; yet he admits he fired at the latter as he was fleeing from the house. It was also proved that "Black Hawk" said, at the time the warrant was issued, that some one was going to be killed, and he did not like Elijah. Yet he was the one selected or permitted to demand admittance to the house.

There seems to have been some disturbance of friendship between appellant and William Wright, though there is no proof of a direct threat by either to do the other personal injury.

It is, however, proved that Elijah Wright had made threats against two or three persons, including the deceased, on account of a law-suit.

A somewhat extended statement of the facts in this case has been made, because necessary to determine the various errors complained of.

1. We think the court erred in refusing to permit Elijah Wright to testify in behalf of appellant.

There is a conspiracy charged in the indictment to murder the deceased; but the record contains no evidence whatever to sustain the charge. No witness states any fact from which it can

be inferred that, previous to the attack by the party of which the deceased was a voluntary member, there was any concert between appellant and Elijah Wright to take his life, either as the means or end of an unlawful design. And there being no evidence on the trial to support the charge of conspiracy, appellant was entitled to the testimony of Elijah Wright. And, for the same reason, evidence of previous threats by the latter was incompetent in the trial of appellant.

2. Instruction 4 is improper, because the court had no right to direct attention to the interest of witnesses in the result or character of statements made by them, the jury being the sole judges of the weight of the evidence and of the credibility of the witnesses.

3. By instruction 6, the jury were told, in substance, that if appellant knew there was a warrant issued against him and others, and that the deceased and others were there for the purpose of arresting him, then he had no right to use force to resist them, except to protect himself or family from death or great bodily harm, although the warrant was illegal. That instruction has no foundation of either fact or law to support it. The record in this case contains no evidence whatever that any warrant of arrest had been issued against appellant, or that he had committed any offence for which a warrant of arrest might issue, or that the party went to his house to arrest him. The evidence in regard to the warrant of arrest, meagre as it is, relates to Elijah Wright, and not to appellant at all.

By whom and how arrests may be made, are provided by the Criminal Code, the sections of which bearing on this case being as follows:

Sec. 36. A peace officer may make an arrest—

1. In obedience to a warrant of arrest delivered to him.
2. Without a warrant when a public offence is committed in his presence, or when he has reasonable grounds for believing that a person arrested has committed a felony.

Sec. 37. A private person may make an arrest, when he has reasonable grounds for believing that the person arrested has committed a felony.

Sec. 38. A magistrate or any judge may orally order a peace officer or private person to arrest any one committing a public

offence in the magistrate's or judge's presence, which order shall authorize the arrest.

It will be perceived that the only cases in which any other person besides a sheriff, constable, coroner, jailer, marshal or policeman, who are by section 26 denominated peace officers, can make an arrest, is under section 37, where the person making it has reasonable grounds for believing the person arrested has committed a felony, or under section 38, where a magistrate or judge orders the arrest of one at the time committing a public offence in the presence of the magistrate or judge. And not even a peace officer is authorized to make an arrest without a warrant issued and delivered to him, except when a public offence is committed in his presence, or when he has reasonable grounds to believe that the person arrested has committed a felony.

There is no evidence showing or tending to show that any of the party had reasonable grounds to believe that Elijah Wright had committed a felony, or even that their purpose was to arrest him for a felony; but the only offence for which they went to the house of appellant to arrest him, if such was their real object, was misdemeanor previously committed, if he had committed any offence.

It is then plain that no one of the party had authority to arrest either appellant or Elijah Wright, the justice of the peace having no right to make it himself, or to deputize Perdue to do so.

Section 39 provides that the person making an arrest shall inform the person about to be arrested of the intention to arrest him, of the offence charged against him for which he is to be arrested, and if acting under a warrant of arrest, shall give information thereof, and if required, shall show the warrant. An arrest made in substantial compliance with the terms of that section is a legal arrest, which no one can lawfully resist. But to make or attempt to make an arrest in disregard or violation of that section is an illegal act, which the person about to be arrested is not required to submit to. And if it had been even a peace officer armed with a warrant instead of the party of unauthorized persons, appellant would have had the right to resist with all the force necessary to prevent the breaking and entering his dwelling-house at the time and in the manner it was done by the party of which the deceased was a member.

The deceased and those with him, therefore, not only had no authority to arrest either appellant or Elijah Wright, but the manner in which it was attempted constituted an assault upon appellant, which he and all the inmates of his house at the time, including Elijah Wright, had the right to resist with all the force necessary to prevent it, even to taking life. For, as has been said "the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle." And it is well settled that when a case arises justifying the owner in resisting the breaking or forcible entrance of his dwelling-house, his servants or guests may arm themselves for the purpose of resistance. (See Wharton on Homicide, section 552, and authorities there cited.) It is true the rule is generally held not to be so extended as to excuse the killing of persons not actually breaking into a house, or in the act of breaking into it. But when, as in this case, the house is actually broken and entered by a portion of a party combined and armed for the unlawful purpose of depriving one of the inmates of his liberty, and carrying him away in the night time, accompanied with an attempt to commit a felony, as was done in this case, the person thus assaulted, as well as the owner of the dwelling, may resist with such force as may be necessary, even to taking the life of those present aiding and assisting, as well as those actually breaking and entering.

Up to the time that the party fell back to the corn-crib, as the facts now appear, the killing of appellant or any inmate of his dwelling-house, would have been murder, while the killing of any member of the party by any inmate of the house would have been excusable homicide. And appellant was not required to remain in his house, nor to retreat from his house, but he had the right, outside or inside, to use such force as was necessary, or reasonably appeared to him to be necessary, even after the party fell back to the corn-crib, to prevent any further assault upon his person or his castle.

A mere demonstration, or even threat, to break a dwelling-house will not excuse a homicide by the owner or inmate. But when, as in this case, it had already been broken and fired into, and a felony attempted, appellant had the right to act according to surrounding circumstances as they appeared to him.

It was, therefore, improper for the court to omit from the instructions the qualification that appellant had the right to fire upon the deceased, or any other member of the party, if he believed from all the circumstances as they reasonably appeared to him, that the deceased or any member of the party was about to again forcibly enter his house, or to fire into it.

It was also improper to make appellant's right to shoot depend upon there being no other reasonably apparent means of escape. He was not required to flee from his dwelling, but had the right to stand his ground and use all the force necessary, or that reasonably appeared to him necessary, in or out of it, to prevent a forcible re-entrance or firing into it with the intent mentioned. For it had been already broken, and an attempt had been made to commit a felony in it, and the party still remained in a menacing attitude, and were still firing at him and the house, as well as at Elijah Wright, who had been compelled to flee for his life. In fact, as this record stands, there had been no cessation of the original unlawful purpose of the party, or of the effort to carry it out.

Wherefore, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

Wilson v. State, 30 Fla. 234; *State v. Steele*, 106 N. C. 766; *Pond v. People*, 8 Mich. 150; *State v. Peacock*, 40 Ohio St. 333; *Corey v. People*, 45 Barb. (N. Y.) 262; *State v. Taylor*, 82 N. C. 554; *Carroll v. State*, 23 Ala. 28; *State v. Scheele*, 57 Conn. 307; *People v. Lilly*, 38 Mich. 270; *Greschia v. People*, 53 Ill. 295; *Estep v. Com.*, 86 Ky. 39; *People v. Coughlin*, 67 Mich. 466; *Patten v. People*, 18 Mich. 314; *Hurd v. People*, 25 Mich. 405; *State v. Martin*, 30 Wis. 216; *De Forest v. State*, 21 Ind. 23; *State v. Davis*, 80 N. C. 351; *Clark* p. 142; *Bishop I.*, Sec. 858-859; *Wharton*, 502, 503; *Hawley & McGregor*, p. 135.

(4) *Enforcement of Law.*

No criminal responsibility attaches for any act done by an officer of the law in the proper execution of a lawful order from a court of competent jurisdiction.

UNITED STATES v. RICE.

Circuit Court of the United States, 1875.

1 Hughes, 560.

On the 15th of last September, Andrew Woody, of Spring Creek, Madison County, was killed by Noah H. Rice, a United States deputy marshal, who was endeavoring to serve a *capias* on him for violation of the Internal Revenue Laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant, Rice, if he attempted to arrest him. When this officer came upon Woody the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defence he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States Court, on Tuesday, May 11th, 1875. He was placed upon trial for his life. The jury having requested full instructions from the bench, they were given as follows by

DICK, J. As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved.

In this court in a trial for crime before one judge, defendants have no right to appeal, and the only remedy which they can have for misdirections to the jury on the part of the judge, is a

motion for a new trial to be heard before the other judges of the court who were not present at the trial; then, upon a certificate of a division of opinion between the judges upon questions of law, the case may be carried to the Supreme Court for review.

In all capital felonies tried by me sitting alone, I will allow defendants who may be convicted the benefit of these remedies; and I will always reduce to writing my instructions to the jury, so that if I commit an error it may be corrected by the other judges who are authorized to preside in this court. All persons whose lives are put in jeopardy by a trial in court ought to have the benefit of all remedies afforded by law to guard against error and injustice.

The humane and remedial provisions of the law ought to be fully afforded by courts of justice in favor of human life.

The defendant in this case is charged with murder by an indictment found in the State Court, and removed under the provisions of an act of Congress to this court. This court has no original jurisdiction of the offence charged, but the case must be tried in the same manner as cases originating in this court; that is, the forms and modes of proceeding and the rules of evidence must be regulated by the course and practice of this court in criminal trials. The law which defines the offence is the criminal law which prevails in this State.

This indictment is not founded upon a State statute, but is for an offence at common law. The laws of this State declare that the common law, with certain specified modifications, shall be in full force in this State. If the indictment was founded upon a State statute, we would be bound to regard the construction and exposition placed upon such statute by the Supreme Court of the State as a rule of decision. As it is founded upon the common law, we will look to the decisions of the State Supreme Court as highly important guides, but not as absolute authorities. We are at liberty to derive information as to the principles of the common law from the decisions of all the courts of England and this country which profess to administer criminal justice according to that wise, just, and time-honored system of law.

It is conceded that the alleged homicide was committed by the defendant, and he places his defence upon the ground that he was a regularly constituted officer of the United States, and had

in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest.

This defence necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties.

Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy.

Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." (Foster, 308.) If an officer is killed while performing his duty, the law deems such killing murder of *malice prepense*.

This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty, is an indictable offence at common law, and the punishment is regulated by the nature of the offence.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons

the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle, that when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. (Garrett's Case, N. C. R., 144, Winston.)

If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then if the said defendant is killed the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. (2 Wharton, *Crim. Law*, 1030-31, and authorities referred to in note.) If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant. The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle

of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. (*State v. Bryant*, 65, 327; *State v. Garrett's Case*, Winston, 144.)

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resists; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. (1 Wharton, Cr. L., Secs. 1289, 2925; *Cooley's Case*, 6 Gray, Mass., 350.)

One who is not a known officer ought to show his warrant and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser *ab initio*, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. (*Garrett's Case*, *supra*.)

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in willfully shooting him down; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. (*Forster's Case*, 1 L. C. C., 187.)

The rule is different in cases of felony. (Bryant's Case, *supra*.)

If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the protection of the law; but it would seem that if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice.

I have stated to you many points of law which do not directly arise in the case before us; but it is important that they should be known and well understood in the country, where, in recent years, so much violence has been committed—violence in the name of law and violence in defiance of law.

The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court.

In performing this important and solemn duty there are three points worthy of your special inquiry:

1st. Whether the prisoner on trial was a known officer of the law and had in his hands, at the time of the homicide, legal process authorizing and commanding him to arrest the deceased.

2d. Whether deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted.

3d. Whether the resistance, if made, had entirely ceased, and the deceased had yielded himself quietly and willingly into the custody of the officer, and no longer had any purpose of resistance.

Upon the first point I will state, as a conclusion of law, that it is the duty of a court to recognize its regular officers and process. I therefore instruct you that the defendant was a regu-

larly constituted officer of this court and the process under which he professed to act was due process of law. The only questions left for you to determine on this point are, Did the prisoner have such process in his hands at the time of the homicide? Was he endeavoring to execute such process? Was he a known officer of the law? And did the deceased have good reason to believe that there was an indictment against him which made him amenable to legal process?

The second and third points presented involve questions of fact which you must ascertain and determine from the testimony in the case. To aid you in the performance of this duty, I will now, in obedience to the requirements of the law, proceed to recapitulate the testimony, and will carefully endeavor not to express an opinion on the subject. I solemnly warn you not to allow your verdict upon questions of fact to be influenced by any impressions that you may form as to the conclusions of my mind. You must form your opinions upon questions of fact from the testimony, and allow no prejudice or outside influence to control your action.

* * * * *

From this recapitulation and your own recollection you will perceive that the testimony is very conflicting. It is your duty carefully to consider the whole testimony and reconcile, as far as you can, any apparent conflicts; and when this cannot be done, you must believe that which you think, under all the circumstances, is entitled to the most credit. If, upon any question, you have a reasonable doubt as to the truth of the matter, you must render this doubt in favor of the defendant. This is the humane rule of the law in all criminal trials, but it is specially important and imperative in trials for capital felonies.

There are some circumstances connected with this case which I feel it to be my duty to call to your special attention, in order that they may not have an improper influence upon your action. The revenue laws have been the subject of much exciting discussion. Some persons advocate their rigorous enforcement, while others denounce such laws as unjust, inexpedient, and oppressive. All persons engaged in the execution of these laws have their warm friends and bitter opponents. No such influences should enter into and control your deliberations. A citizen on

trial for crime is entitled to be confronted in court by his accusers and have them solemnly sworn to tell the truth. He is also entitled to be tried by a jury of his peers, who are free from all prejudices, and who in their action will have an eye single to justice and truth. These rights are as old as the common law; they constitute fundamental principles of English and American freedom, and have been secured in the Federal and all State constitutions. They extend to all trials for crime, but they ought to be especially regarded as sacred and inviolable where human life is put in jeopardy.

You, gentlemen of the jury, acting under the solemn obligations of your oath, and as fair-minded and impartial men, should discard all opinions and prejudices which you may have formed for or against the defendant, and try him as all citizens charged with crime ought to be tried—according to the law and the testimony.

Gentlemen of the jury, if you come to the conclusion, after weighing all the testimony, that the deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted, then you will find the defendant not guilty.

2d. If you find that resistance was made but had entirely ceased and the deceased had yielded himself quietly and completely into the custody of the officer, and no longer had any purpose of resistance, then the prisoner is guilty of manslaughter; and if sufficient time had elapsed for the prisoner to get over the excitement caused by the resistance, then he is guilty of murder.

If you have any reasonable doubts upon these questions, then the defendant is entitled to the benefit of these doubts.

The jury, after a retirement of two hours, found a verdict of "not guilty."

U. S. v. Clarke, 31 Fed. Rep. 710; Wolf v. State, 19 Ohio St. 248; Kelly v. State, 68 Fed. 652; Dilger v. Com., 88 Ky. 550; State v. Moore, 39 Conn. 244; State v. Turlington, 102 Mo. 642; State v. Bland, 97 N. C. 438; Jackson v. State, 76 Ga. 473; Head v. Martin, 85 Ky. 480; State v. Dieberger, 96 Mo. 666; Clark, p. 133; Wharton, 508; Hawley & McGregor, 122.

(5) Public Policy.

Acts otherwise criminal may be justified on the ground of public policy, when done distinctly and unequivocally for the public weal.

STATE v. MAYOR AND ALDERMEN OF KNOXVILLE.

Supreme Court of Tennessee, 1883.

12 Lea, 146.

FREEMAN, J., delivered the opinion of the court.

It appears from this record that in the latter part of the year 1882, and first of 1883, the small-pox, as an epidemic, prevailed to a considerable extent. The city of Knoxville, as well as the county, thought it their duty, through their authorized agencies, to take active measures to relieve as well as prevent the spread of the disease both in the city and the surrounding country. To this end a small-pox hospital was established at the fair-grounds, about two miles from the city, with suitable buildings for receiving infected patients, and two physicians, Drs. Hudgins and Shaw, employed, the one by the city, the other by the county, to attend patients suffering with the disease. Among the precautionary measures taken to prevent the spread of the plague, the clothing, beds and bedsteads used by persons who had the disease, and either recovered or died, were directed to be burnt, no doubt under the direction of the attending physicians. This, we take it, was done regularly and frequently for some months, as often as occasion required. The fair-grounds property consisted of between sixty and sixty-five acres of land, the building being within this property, and the infected articles burnt on these grounds, probably in pits dug for the purpose. The burning seems to have been some four hundred yards from the nearest houses, but there appears to have been numerous dwellings occupied about that distance, and farther off, but still liable, more or less, to be affected by the smoke and the scent from the burning clothing, &c. That this at times was more or less offensive is probable, if not certain. For a nuisance, the result of this burning and the

unpleasant effects of the smoke thus generated and disseminated, the defendants are indicted.

The substance of the charge in the indictment is as follows: "That the defendants in April, 1883, near the houses of divers good citizens of the second district of said county, and near two public and common highways, to wit: the Rutledge pike, and the road running through and by Eastport for all the people to pass, did keep and maintain a certain house and ground known and called a small-pox hospital, where small-pox patients and persons afflicted with the loathsome disease were conveyed and quarantined by said Board of Mayor and Aldermen and J. C. Hudgins, and that they, the defendants, unlawfully and injuriously did burn, and caused to be burned, bed-clothes, feathers, bedsteads and clothing, that had been used upon, for and about, and in nursing said small-pox patients, and persons afflicted with small-pox, and being infected with small-pox as aforesaid." It is then averred "that by means aforesaid, that is by such burning, the said defendants did in fact impregnate and poison the atmosphere around and about said public highways and said dwellings and grounds of citizens, whereby noisome, unwholesome smells from said burning aforesaid on divers days did arise so that the air was made corrupt, noisome and unhealthy to the common nuisance of the good citizens residing and passing," &c.

We have quoted the language of the indictment, to which the defendants plead not guilty.

The question definitely made by this averment is whether the defendants are guilty of a public nuisance by burning the clothing, beds, &c., of small-pox patients so as to impregnate the air by such burning with smoke, to the annoyance, hurt or inconvenience of the public residing near by or passing the public roads in the manner indicated by the statement of the indictment?

It is not averred that the manner of doing this was improper, that there was any neglect of ordinary or reasonable precautions to protect persons from the effects of the burning clothing, but only that it was "unlawfully and injuriously done," producing the smoke by which the air was unwholesomely impregnated with offensive smells from the burning articles, and this unwholesome infection of the air is averred to have been a common nuisance.

There is no averment of the indictment putting in issue the right of the city or county to establish this hospital, or that the hospital itself was *per se* a nuisance. The establishment of the hospital is only stated by way of historical inducement to the real charge, which is, that by burning the clothing, beds, &c., the air was rendered unwholesome and noxious, and offensive to the citizens inhabiting near the place and the public highways. This is the real question, then, presented by the indictment, whether under the facts and circumstances of the case, under a proper charge of the court, the defendants are guilty of an offence against the public to be punished by the State in what they are charged to have done.

That the State may well authorize the erection of hospitals, and make such regulations as shall be deemed effective to prevent the spread of an infectious epidemic disease, no one at this day would question. It is among the inherent police powers that belong to all governments. Regulations requiring drainage in cities, the removal of offal and noxious decaying substances in the midst of dense populations, and many other like things, belong to this category. See Cooley Const. Lim., 5th ed., 740-1-2-3.

That it can equally authorize such needful regulations and establishments by towns and cities, is equally clear. In fact it might be fairly inferred, as the incidental powers of a municipal government charged with the protection of life and property of a citizenship by the necessity of the case, closely aggregated within a comparatively small space, where infection in case of prevalent epidemics is liable to spread rapidly and certainly, to establish hospitals, and make such regulations as would tend to isolate the infected from contact with the general public. The failure to exercise such power would be deemed in this age a mark of a crude and undeveloped civilization. See Wait's Actions and Def., Vol. 4, 764, and authorities cited. Suffice it to say, however, here, that the power to establish the hospital in this case is not a question raised by the indictment directly, but the question is whether the impregnation of the air by the smoke from the burning clothing under the circumstances is criminal? That smoke or noxious vapors which materially corrupt the air, rendering the occupation of houses near by uncomfortable as habitations is a nuisance, is settled by the uniform current of au-

thorities. That the owner or occupier of houses, whether in the city or country, has the right to enjoy pure and wholesome air, that is, as pure and wholesome as their local situation can reasonably supply, and any act which materially corrupts or pollutes the air, done without authority or justification is strictly a nuisance, is well settled by authority. See Wait's Actions and Def., Vol. 4, 748, authorities cited. This is all clear. The jury have found the defendants guilty, and on the facts, that is of the existence of the smoke, and of its rendering the occupation of the houses of persons living hard by uncomfortable, and the air less pure temporarily than otherwise, would have been the case from the nature of their location, there is no ground on which this court could reverse the finding of facts for want of testimony to sustain it.

The question is, whether this finding was under a correct statement of the law by the court below, and whether there was a sufficient justification and authority for what was done; whether his Honor gave defendants the benefit of the rules of law tending to show such justification and authority for their acts, which are not of themselves denied or seriously controverted?

His Honor, after defining a nuisance with reasonable accuracy, and telling the jury that the burning must have been of such character, and so often, as to create a permanent, frequent and common nuisance, said to the jury that the question was not as to the authority of the city and county to take precautionary measures to prevent the spread of disease, or to build a hospital for that purpose, nor whether it was properly located, or even whether it was a suitable place, nor whether the burning was the best means to destroy infected articles of bedding, clothing, &c. He then refers to the grounds of the defence that no nuisance was really committed, and if so, the acts were within the scope and authority conferred on the county and city authorities by law.

In reference to these defences he tells the jury that if no nuisance was committed, that is, no injury done by the burning to the purity of the air, as a matter of course defendants were not guilty.

As to whether there was any legal authority for doing what was done, that is, the burning the clothing, &c., and consequent creation of the smoke complained of, he says, substantially, that

the powers conferred on county court or city authorities to prevent the introduction and spread of diseases must be construed to mean lawful acts, and not the exercise of unlimited and arbitrary powers, and it could not be presumed the Legislature intended to confer such powers, as from mistake, want of proper information or regard to the rights of individuals and the public, with design or otherwise, greater evil may arise than they may be combatting. How an act authorized by the Legislature could *per se* be unlawful we do not see.

He then on this basis told the jury the Legislature could not be construed to have authorized a violation of law, and the powers conferred on the city were to be exercised with due regard to the legal rights of all, and if in the exercise of their powers the city or county should violate the law, they would be amenable to the law for its violation. Just precisely what his Honor intended the jury to understand by these generalities it is not very easy to see thus far. But the next sentence enables us, perhaps, to gather the application of the remarks quoted. He summed up the point to the jury in these words: "The question on the indictment is, nuisance or no nuisance, and if the nuisance be proved, then the next question is, who caused it, or procured it to be done?" He then instructs the jury that in misdemeanors all who participate are principals in the act, and adds, "relatively all citizens of community have rights for the use and enjoyment of the common air in as pure a state as the ordinary transactions of men permit."

The theory of all this is, that though the hospital was properly located, and burning the best means to destroy the infected articles of clothing, and the like, under the circumstances, yet if in doing it the air was rendered less pure than by the ordinary transactions of men, the defendants were guilty, and should be convicted of the nuisance charged. This, under his previous definition of a nuisance, as "that which incommodes or annoys, something which produces inconvenience or damage," left the jury nothing to do but find this inconvenience or annoyance, and if so, then a verdict of guilty must follow.

This is made stronger and clearer by his refusal to charge as requested by defendant's counsel in the first request made, which was substantially that if the burning "of the infected clothing which had been used by persons afflicted with small-pox, at or

near the hospital grounds, was reasonably necessary to prevent the spread of the disease, and if done in a place reasonably remote from human habitation, then the mere smoke and smell arising from the burning of such clothing, although it may have been a temporary and slight inconvenience to such of the people as may be living in the neighborhood, would not, under these circumstances, be an indictable nuisance. This request is sound law, as we think. Refusing this request, and charging as he did, involved the proposition that means reasonably adopted to prevent the spread of the disease could not be used if it produced temporary inconvenience to persons resident near where the means were thus being used.

In this his Honor clearly erred—all the rules of our law that rest on the idea of restraint or limitation placed upon the rights of the individual, where the interest of the public are to be advanced or protected, are based on the opposite theory from what is thus announced by his Honor.

The general principle resulting from the decided cases is thus given by Judge Cooley, *Const. Lim.*, 5th ed., 739: "It would," he says, "be quite impossible to enumerate all the instances in which the police power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and variety. And there are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even destroy it, where the owners themselves have fully observed all their duties to their fellows and to their State, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any great public calamity. Here the individual is in no default, but his interest must yield to that necessity which knows no law."

The principle thus stated is sound and applicable to the case in hand. The proof very definitely tended to show that burning the articles mentioned was the best means known of preventing the

spread of infection, if not the only certain means of doing so, that it was the uniform practice in hospitals, where such diseases were being treated and recognized as the accredited mode recommended and endorsed by the best lights of the medical profession.

If this be so, then the simple question is, whether parties using such means so accredited, in good faith, shall be held criminally liable if they should produce temporary inconvenience to other parties near by, for this is the substance of the request refused by his Honor.

The loss to the individuals was only a temporary one by having the air for a time impregnated with smoke, offensive though it was, yet if this was done in order to, and did reasonably tend to, prevent the spread of a loathsome and dangerous disease, by which the lives of from twenty-five to fifty per cent. of persons attacked are liable to die, as one physician swears in this case, then it is too clear to doubt that the interest of the life of many cannot be permitted to be periled that others may enjoy the air untainted by smoke from clothing infected by the disease, being burned at a reasonably safe distance from their dwellings. If you may rightfully destroy the house in which a man dwells in order to prevent the spread of a fire or the ravages of a pestilence, it follows you may much more destroy for a time the salubrity of the air, provided it shall tend reasonably to the result demanded by the public interest.

We do not deem it necessary to enlarge on such a proposition.

The rule applicable to such a case is, that if the act was done by public authority or sanction, and in good faith, and was done for the public safety, and to prevent the spread of the disease, and such means used as are usually resorted to and approved by medical science in such cases, and was done with reasonable care and regard for the safety of others, then the parties were justified in what they did, and the parties inconvenienced could not complain, nor could the State enforce a criminal liability for results of temporary inconvenience or unpleasantness that accrue from the use of such proper and accredited means for the safety of the community against the spread of disease.

The theory of his Honor is the opposite of this, and is erroneous. Let the judgment be reversed and the case remanded for a new trial.

3. ACT.

The wrongful intent must manifest itself in a wrongful overt act; and the intent and act must concur.

Yoes v. THE STATE.

Supreme Court of Arkansas, 1848.

9 Ark. 42.

ENOS Yoes was indicted in the Washington Circuit Court for an assault and battery upon James C. Hughs. He was tried on the plea of not guilty, at the May Term, 1847, before the Hon. Wm. W. Floyd, judge, convicted and fined ten dollars. Pending the trial, he took a bill of exceptions, from which it appears:

The said Hughs, sworn as a witness for the State, testified that on the 28th July, 1848, he was at a place, in Washington County, where there was a meeting—was some eighty yards from the meeting house, when defendant came up, and said he wished to speak to him, and called him aside—he followed; defendant and he conversed for some time, when defendant gave witness the lie, or witness gave him the lie; defendant kicked witness, he struck defendant, and then they fought.

Being interrogated thereto, by defendant's counsel, witness denied that he had, on the same evening, after the fight, at night meeting, told one Tulk that when defendant gave him the lie, he threw off his hat and attempted to collar defendant—witness was positive that he had told Tulk no such thing.

Another witness for the State testified that he was present, heard defendant call Hughs out—thought defendant was in an ill humor—presently, he heard a noise like a kick, looked and saw Hughs and defendant fighting, but did not know which commenced the fight.

Another witness heard defendant say to Hughs, "Come this way, I wish to speak to you," and soon afterwards saw them fighting, but did not know who began it.

Tulk, witness for defendant, testified, that on the evening after the fight, at night meeting, and just about sun-down, said

Hughs told him that defendant gave him (Hughs) the lie, and that he (Hughs) threw off his hat and attempted to collar defendant, when defendant kicked him. Witness was present when defendant called Hughs out, but did not know which commenced the fight.

This being all the testimony, the State's Attorney asked the court to charge the jury "that if they believed, from the evidence, that defendant went to the meeting-house yard, and called Hughs out for the purpose of having a difficulty with him, they must find defendant guilty." Also, "if the jury believed from the evidence, that Hughs made a different statement about the difficulty to Tulk, to that which he now makes, they will not disregard Hughs' testimony, unless they believed the different statements were made willfully and knowingly."

To the giving of which instructions, the defendant objected, but the court gave them, and he excepted.

JOHNSON, C. J. The Circuit Court manifestly erred in giving the first instruction asked by the State. The instruction is, that if the jury believe from the evidence that the defendant went to the meeting-house yard and called Hughs out for the purpose of having a difficulty with him, they should find him guilty. A crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence. See 1st Sec. of Chap. 44 of the Revised Statutes. The mere fact of going to a place with the intention of doing an unlawful act, will not of itself subject the party to the punishment denounced against such act unless he also carries his intention into effect. If the defendant below actually made an assault upon Hughs in pursuance of his preconceived and settled intention, then it was that the motives, which induced him to go to the place where Hughs was, might have been legitimately inquired into in aggravation of the fine, but could not under any state of case have furnished conclusive evidence of his guilt. No valid objection is perceived to the last instruction. But for the error in giving the first, the judgment must be reversed.

Stein v. State, 37 Ala. 123; Riley v. State, 16 Conn. 47; Slattery v. People, 76 Ill. 218; Fairlee v. People, 11 Ill. 1; People v. White, 34 Cal. 183;

People v. Harris, 29 Cal. 679; People v. Anderson, 14 John 294; People v. Cogdell, 1 Hill 94; State v. Dean, 49 Ia. 73; State v. Wood, 46 Ia. 116; Bishop I., Sec. 204; Hawley & McGregor, p. 3.

a.

Individual.

The act may be done by one individual, when it is called an individual criminal act.

b.

Joint.

The act may be committed by many joining in a united plan, or in furtherance of a common effort, and is then a joint criminal act, and each is punishable for all that is done.

WILLIAMS v. THE STATE.

Supreme Court of Alabama, 1887.

81 Ala. 1; 1 So. 179.

INDICTMENT for murder.

The grand jury of Barbour County, at the Fall Term, 1886, found a true bill against John Williams, Shade Scarbrough, Tiola Scarbrough, Dennis Williams, Jim Williams, Will Williams, and Back Lampley, charging them with the murder of Madison Ceasar, by shooting him with a pistol. Said parties, except the last mentioned, were tried on December 4, 1886. The result of the trial was that Shade Scarbrough was found guilty of murder in the first degree, and sentenced to be hanged; John and Dennis Williams were found guilty of murder in the second degree, and sentenced each to the penitentiary for 40 years; and Jim and Will Williams and Tiola Scarbrough were found guilty of murder in the second degree, and sentenced each to the penitentiary for 20 years. The judgment of the court was stayed to await the result of this appeal.

The testimony in this cause, as shown by the record, tended to show that the deceased came to his death by a pistol shot on the 6th of July, 1886, about 11 o'clock at night; that a difficulty took place at about 3 o'clock, on the afternoon of said day, at the cotton-house on the Parish plantation, between Jim Williams, one of the defendants, and another party; that among those present was John Williams, one of the defendants, who had a gun, and whom deceased ordered off; that different ones of the defendants were together during the afternoon talking about Madison Ceasar, the deceased, in a threatening and unfriendly manner; that during said night they were all at the house of deceased.

One Britt testified that he was at his own house asleep, was awakened by hearing Madison Ceasar's wife calling him, and got up and went to his house; that he found John Williams and Back Lampley at the gate, who cut at him, and tried to prevent his going in; that Dennis, Jim, and Will Williams, and Tiola Scarbrough came out of the house and tried to prevent his going in, but he forced his way in, and found deceased and Shade Scarbrough sitting before the fire. Shade threw something into his face which he took to be a pistol, and asked: "Who is that?" Witness answered: "Shade, this is Joe Britt." The parties outside then coming in, Shade told them not to hurt witness, as he was his friend. Shortly afterwards deceased left the house, but returned in about half an hour, with a gun. He called for Shade from the back door, who asked what he wanted, and, receiving no answer, said he would be there directly. Just before Shade went out he said: "Dennis, you go round the house; I will go round by the chimney." They both went out to the front, and deceased came in from the back door, with a gun in his hand. A struggle ensued for possession of the gun, which was continued into an adjoining room. Shade having returned, went into the latter room, where he shot deceased twice, killing him.

A witness testified that, after the killing, she met all of said parties in the road, about 100 yards from the house of deceased; that Shade was staggering, and seemed drunk; that she asked what was the shooting about, and Shade replied that he "did it; that he had shot Madison Ceasar; that he didn't have a thing in the world against him." She replied, "You are joking." He answered, "No." She asked, "What for?" and he said, "John and

these boys got me to do it." John said, "Hush!" and the others said nothing. The defendants drank together during the evening.

The defendants moved to exclude these declarations, which the court overruled.

The court, at the request of the State, gave the following charge: "If the defendants entered into a conspiracy to assault and beat or to kill Madison Ceasar, in this county, and before the finding of this indictment; and, in pursuance of the common design to either assault and beat or kill Madison Ceasar, Shade Scarbrough killed Madison Ceasar, * * * the defendants being near at hand, by shooting him with a pistol, in his own house, and not in self-defence,—the jury cannot acquit any of said defendants." An exception was duly reserved to the giving of this charge by each of said defendants.

The defendant, Shade Scarbrough, in writing, requested the court to give the following charge, among others: "(4) If the jury believe from the evidence that Shade Scarbrough was drunk at the time of the shooting, they may further believe that he may have been in such a state of mind as to be totally incapable of entertaining and forming the positive and particular intent requisite to constitute the offence of murder; and, if they so believe, the defendant is entitled to an acquittal of any felony, not because of the drunkenness, but because he was in such a state of mind, resulting from drunkenness, that will negative the facts necessary to a conviction." The court refused to give this charge to which action of the court an exception was duly reserved.

The first charge requested by John Williams was: "(1) Conspire means to breathe together. A conspiracy to commit an offence is where two or more persons agree together to do an unlawful act. Unless the jury believe, in this case, from the evidence, beyond all reasonable doubt, that John Williams, prior to the homicide, agreed or conspired with Shade Scarbrough, or any other one of the participants in this killing, to take the life of Madison Ceasar, or to do him some bodily hurt, then they must find John Williams not guilty, and in coming to a conclusion upon this, they can look only to the evidence touching John Williams. They can't look to the fact, if it be a fact, that Madison Ceasar was killed by any one's hands, unless the act of

killing connects John Williams with the killing, or to do the deceased bodily hurt." The court refused this charge, and an exception was reserved.

SOMERVILLE, J. 1. The question most pressed on our attention, and the one of controlling influence on the merits of this case, is raised by the first charge given by the court at the instance of the State. This charge asserts, in substance, that, if the defendants, all entered into a conspiracy to assault and beat or to kill the deceased, and, in pursuance of such common design, one of said defendants did kill deceased by shooting him with a pistol, in his own house, and not in self-defence, the other defendants then being near at hand, all of the defendants would be guilty of murder. Other charges asserting the converse of this were requested by the defendant, and refused by the court.

It must be kept in mind that the defendants are not indicted in this case merely for a conspiracy to commit murder, but as principals in the crime of murder itself. Nor is the case complicated by any inquiry as to distinctions between accessories before the fact and principals in crime, or principals in the first and second degree; the statutes of this State having, in cases of felony, abolished the common-law distinction in this particular by providing that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offence, or aid or abet in its commission, though not present," are authorized to be indicted, tried, and punished as principals. Code 1876, Sec. 4802; *Hughes v. State*, 75 Ala. 31.

The general rule is familiar that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine. The point of difficulty arises in applying this general principle, when it is sought to ascertain what particular acts come within or are departures from the common design or plan. It is very clear that one may often be responsible for an act, committed either by himself or by a confederate, which he did not specifically intend to commit. A common example is found in the case, often adjudged, where one who commits a mere civil trespass by shooting at another's fowls,

wantonly or in sport, may be held guilty of manslaughter when the death of a human being accidentally ensues; and, if his intent was to steal the fowls, then of murder, although he did not specifically intend homicide in either case. So the case is put by Mr. East, if one willfully, with intent to hurt, throw a large stone at another, and by accident kill him, this is murder; but if the stone is small, and not likely to produce death, it would seem to be manslaughter. 1 East, P. C. 257. It is thus an important rule, as we shall more fully show, that the responsibility for incidental and often for accidental results broadens with the magnitude or heinousness attached to the unlawful act specifically agreed to be perpetrated. This is upon the principle that every one is presumed to intend, and therefore must be held responsible for, the natural and probable consequences of his own acts. It necessarily follows that, where one person combines with another to do an unlawful act, he impliedly consents to the use of such means by his confederate as may be necessary or usual in the successful accomplishment of such an act. The more flagrant and vicious the act agreed to be done, the wider is the latitude of the agency impliedly conferred to execute it.

The rule of criminal responsibility, in cases of conspiracy or combination, seems to be that each is responsible of everything done by his confederates which follows incidentally, in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. 1 Whart. Crim. Law (9th Ed.), Secs. 214, 220. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates, outside of or foreign to the common design. Nor must it have been committed by one of the confederates after the explosion of the plot, or the abandonment of the common design, or from causes having no connection with the common object of the conspirators. 1 Bish. Crim. Law (7th Ed.), Secs. 640, 641; 1 Whart. Crim. Law, Sec. 397; *Lamb v. People*, 96 Ill. 73; S. C. 2 Crim. Law Mag. 472; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 37.

The application of the rule to cases of homicide is made in 1 Hale, P. C. 441, where it is said: "If divers persons come in one company to do an unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them, in doing thereof, kill a man, this shall be adjudged murder in them all that are present of that party abetting him, and consenting to the act, or ready to aid him, although they did but look on." And the following language is used in 1 East, P. C. 257: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays,—as by committing a violent disseizen with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse,—they must at their peril abide the result of their actions."

It has long been a rule of law, now often repeated by the text writers, that "if A. command B. to beat C., so as to inflict grievous bodily harm, and he beat C. so that C. dies, A. is an accessory to the murder, if the offence be murder in B." 1 Whart. Crim. Law, Sec. 225; 1 Hale, 617. The line of distinction here is narrow, as appears from the proposition announced by Mr. Bishop, in support of which there are many adjudged cases. "If," he says, "two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide; but, if one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." 1 Bish Crim. Law (7th Ed.), Sec. 637; Reg. v. Caton, 12 Cox, Crim. Cas. 624; S. C. 10 Eng. R. 506. The implied agreement here is evidently not to resort to the use of a deadly weapon, and the use of such weapon is therefore foreign to the contemplation of the parties, and a departure from the common design. It is said by some of the standard authors that, if the specific act agreed to be done was *malum in se*, the responsibility for unintended results would embrace acts arising from misfortune or chance; but otherwise, if such specific act was *malum prohibitum* merely, or lawful. 1 Bish. Crim. Law (7th Ed.), Sec. 331; Archb. New Crim. Proc. 9. In some cases the distinction is taken that, where persons unlawfully conspire to commit a trespass only, to make all the confederates guilty of murder the

death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a trespass, it will be murder in all, "although the death happened collaterally, or besides the original design." *State v. Shelledy*, 8 Iowa, 478. In another recent case the rule was announced that "if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not." *Lamb v. People*, 96 Ill. 73.

The question in this case, then, would seem to be whether, if five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and, in furtherance of this common design, all of the confederates being present or near at hand, one of them gets into a difficulty with their common adversary, and kills him, all may not be guilty of murder, although they did not all entertain a purpose to kill. The question, we think, must be answered in the affirmative, in the light of both principle and authority. Every man has the right to defend his house against every unlawful invasion, and to defend his person, when within it, against every and all violence, without the necessity of retreat. The experience of mankind shows that very few men will fail to respond to instinct by exercising this right to the extent even of killing an assailant if necessary. When a mob, conspiring together unlawfully, go to a man's house to do any serious violence to his person, especially in the night-time, as here, they can expect nothing else than to meet with armed opposition, and the inference is not unreasonable that they intend nothing less than to oppose force to force, in the furtherance of their design. The natural and probable consequence of this is homicide,—either of one or more of the assailants, or of the party thus assailed,—and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit the unlawful act of violence, especially if they be near at hand, inciting, procuring, or encouraging the furtherance of the act of assault and battery.

The adjudged cases sustain this view, some of which we proceed to cite.

In *Peden v. State*, 61 Miss. 268, the precise question was presented and decided. There several persons conspired together to take one Walker from his house and whip him. He was accordingly taken from his bed and severely beaten, and in executing this design one of the confederates struck him a fatal blow with a spade, from which he died. It was held that all were guilty of murder, whether they entertained a purpose to kill Walker or not.

In *Brennan v. People*, 15 Ill. 512, where a large number of defendants were indicted for the murder of one Story, instructions were asked which required the jury to acquit the prisoners unless they actually participated in the killing of deceased, or unless the killing happened in pursuance of a common design, on the part of the prisoners and those doing the act, to take his life. The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide."

In *Shelley's Case*, 8 Iowa, 478, the defendants had taken one Wilkinson, and, after tying him with a rope, put him in a carriage, started with him to the woods, making menaces of violence against him, by which he was induced to jump from the vehicle into a river, and was drowned, no effort being made to rescue him. It was held that all the confederates might be properly convicted of murder, although some of them designed only to commit personal violence on the deceased, without intending to kill him.

In *Miller v. State*, 25 Wis. 384, the wife of the defendant, without fear or compulsion from him, agreed with him to go to the store of one Wright, the deceased, and to rob it; the husband telling her, and she believing, that he did not intend to kill Wright, but only to knock him down so as to stun him, in order

to consummate the robbery. They went together, and the husband, in carrying out the plan, gave the deceased a fatal blow, the wife giving no intentional assistance. A charge was sustained which justified the jury, under this state of facts, in finding her guilty of murder.

In *Miller v. State*, 15 Tex. App. 125, the evidence tended to show that the defendant and two others by the name of Harden acted together in provoking a contest with deceased, one Linson, either with the purpose of killing him, or of doing him some serious bodily harm, and in pursuance of this common design one of the Hardens, in the presence of the defendant, shot and killed deceased. It was held that, if the jury believed the evidence, they could lawfully find the defendant guilty as a principal in the act of murder.

In *Ferguson v. State*, 32 Ga. 658, the defendant was convicted of robbery. The facts were that, having effected escape from his own cell in a jail, the defendant had broken the locks off the doors of other cells, the inmates of which, so soon as the jailer made his appearance, set upon, bound, and blindfolded him, and then some of them proceeded to rob him. The trial court refused to charge the jury that the prisoner could not be convicted of robbery if he was unaware of the intent to rob; but that it was sufficient if the prisoner conspired with the others to effect an escape, and that the robbery charged was in furtherance of this design, the prisoner being near enough at hand to render assistance to those actually committing the felony.

Under the foregoing authorities we are of opinion that the rulings of the court, on this particular branch of the law, were free from all error.

The case of *State v. Absence*, 4 Port. (Ala.) 397, is not in conflict with this view. There the defendant had participated in an assault and battery committed in a personal rencounter between one Weaver and one Mosely, only so far as to push the former toward the latter for the purpose of causing a fight between them. A fight ensued, in the progress of which Mosely committed mayhem on the person of Weaver by biting off his right ear, which was a felony. A charge was held erroneous that, under this state of facts, Absence would necessarily be guilty of mayhem without participation in the felonious intent of Mosely. It

was, however, left an open question in that case whether, if two or more persons should agree together to do some great bodily harm to another, and one of them committed mayhem on the party beaten, all who are present would not be guilty of the mayhem. It may be remarked that Mr. Bishop criticises this case as doubtful, and Mr. Wharton thinks it erroneous. 1 Bish. Crim. Law (7th Ed.), Sec. 635; 1 Whart. Crim. Law (9th Ed.), Sec. 214, note 1.

2. There is no error in the refusal of the court to quash the *venire*. The name of R. C. Stanley appeared on the original list of jurors. On the copy served on the defendant the name was written D. C. Stanley. This was a mere mistake or discrepancy in the name of the person summoned, and, under the provisions of the statute, was no sufficient cause to quash the *venire*, "unless the court, in its discretion, was of opinion that the ends of justice so required." Code 1876, Sec. 4876; *Jackson v. State*, 76 Ala. 26; *Hubbard v. State*, 72 Ala. 164; 3 Brick. Dig. p. 264, Sec. 168.

3. The objection, moreover, came too late; not having been interposed until the entire jury had been drawn, impanelled, and accepted by the State, and was offered for acceptance to the defendants.

4. The declaration made by the defendant, Shade Scarbrough, in the presence and hearing of the other co-defendants, directly implicating them as accessories in the alleged murder of the deceased, was admissible, in our judgment, against all of the defendants. It may be that the jury should have exercised great caution in drawing any implications of guilt from the silence of the other defendants, but this went only to the weight of the evidence. The charge embodied in this declaration, that the other defendants had instigated him to commit the crime, was one naturally calling for contradiction under the circumstances if it was in fact untrue. *Campbell v. State*, 55 Ala. 80; Steph. Dig. Ev. art. 4, p. 10.

5. Conceding, moreover, that this evidence was inadmissible against all the defendants, it was certainly admissible against Scarbrough, the one making the declaration, and the remedy was not a motion to entirely exclude it from the jury, but the settled practice is a request for instructions limiting its effect, so as

to confine the influence of the evidence only to the defendant against whom it was admissible. *Lewis v. Lee Co.*, 66 Ala. 480; 1 Brick. Dig. p. 810, Secs. 98, 99.

6. The fourth charge requested by the defendant Scarbrough was clearly erroneous, and was properly refused by the court. There is no evidence tending to show that, at the time of the killing, he was so drunk as to be incapable of understanding the nature of the act committed by him. Drunkenness, moreover, would not entirely excuse the crime. It could only operate, at most, to reduce the grade of the homicide from murder to manslaughter by rebutting the existence of malice aforethought in the mind of the perpetrator. *Ford v. State*, 71 Ala. 385. The other charges requested by the defendant Scarbrough were manifestly erroneous, and their refusal was without error.

7. The first charge requested by the defendant, John Williams, was susceptible of the interpretation that the defendants must have entered into an express agreement to do an unlawful act before they would be guilty of a conspiracy; thus ignoring the fact, which the evidence tends to prove, that the defendant, Williams, and others were near at hand, encouraging the perpetration of the homicide, either by abetting the act of killing or inciting the unlawful acts which immediately led to it. The charge was therefore misleading, if not erroneous, and was properly refused.

8. If the evidence *prima facie* established a combination or conspiracy to invade the premises of deceased, and to beat or kill him, the acts and declarations of each of the confederates done or made in furtherance of the common design were the acts and declarations of all. The eleventh charge requested on behalf of the defendant, John Williams, was repugnant to this principle, and its refusal was without error.

9. The twelfth charge requested by the same defendant, and the third charge requested by the defendant, Dennis Williams, were abstract, there being no evidence to support either of them. Each was rightly refused by the trial court.

We have closely examined the record in this case, and are constrained to say that we find no error in it. The judgment of the court is accordingly affirmed as to each of the several defendants; and, the day appointed by the Circuit Court for the execution of

the sentence of death upon one of the defendants, Shade Scarbrough, having passed, it is accordingly ordered and adjudged by this court that Friday, the 11th day of March next, A. D. 1887, be fixed for the execution of said sentence, and on that day the sheriff of Barbour County will proceed, in all respects in the manner provided by statute, to execute the sentence of death upon the said Shade Scarbrough by hanging him by the neck until he is dead.

Turk v. State, 2 So. 256; *Butler v. People*, 125 Ill. 641; *Doan v. State*, 26 Ind. 495; *State v. Dowell*, 11 S. E. 525; *Speis v. People*, 12 N. E. 865; *State v. Crab*, 26 S. W. 548; *Jennings v. Com.*, 16 S. W. 348; *Brown v. Com.*, 19 S. E. 447; *Lamb v. People*, 96 Ill. 73; *People v. Vasquez*, 49 Cal. 560; *Miller v. State*, 25 Wis. 384; *State v. Shelledy*, 8 Ia. 478; *Miller v. State*, 15 Tex. App. 125; *Stephens v. State*, 42 Ohio St. 150; *Regina v. Williams*, 7 Cox C. C. 357; *Clark*, p. 81; *Bishop L.*, Sec. 630.

Principals and Accessories.

Persons joining in the commission of felonies are divided into principals or accessories, according as they are present, or absent at the time the act is done.

(1) *Principals are either of the first or second degree.*

(a) *Principals of the First Degree.*

A principal of the first degree commits the act himself, or through the medium of an innocent third person.

REGINA v. MICHAEL.

Crown Case, 1840.

2 Moody C. C. 120.

THE prisoner, Catherine Michael, was tried before Mr. Baron Alderson at the Central Criminal Court in April, 1840 (Mr. Justice Littledale being present), for the willful murder of George Michael, an infant of the age of nine months, by administering poison.

The indictment alleged that the prisoner contriving and in-

tending to kill and murder George Michael on the 31st of March, in the third year of the reign of her present Majesty, upon the said George Michael feloniously, &c. did make an assault; and that the prisoner a large quantity, to wit half an ounce weight of a certain deadly poison called laudanum, feloniously, &c. did give and administer unto said George Michael, with intent that he should take and swallow the same down into his body (she then and there well knowing the said laudanum to be deadly poison), and the said laudanum so given and administered unto him by the said Catherine Michael as aforesaid, the said George Michael did take and swallow down into his body, by reason and by means of which said taking and swallowing down the said laudanum into his body as aforesaid, the said George Michael became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said George Michael from &c. till &c. did languish &c. and died; and concluding in the usual form as in cases of murder.

It appeared in evidence that the prisoner on the 27th day of March last, delivered to one Sarah Stephens, with whom the child was at nurse, a quantity of laudanum about an ounce, telling the said Sarah Stephens that it was proper medicine for the child to take, and directing her to administer to the child every night a teaspoonful thereof. That such a quantity as a teaspoonful was quite sufficient to kill a child; and that the prisoner's intention, as shown by the finding of the jury in so delivering the laudanum and giving such directions as aforesaid, was to kill the child.

That Sarah Stephens took home with her the laudanum, and thinking the child did not require medicine had no intention of administering it. She, however, not intending to give it at all, left it on the mantelpiece of her room, which was in a different house from where the prisoner resided, she, the prisoner, then being a wet nurse to a lady; and some days afterwards, that is, on the 31st of March, a little boy of the said Sarah Stephens, of the age of five years, during the accidental absence of Sarah Stephens, who had gone from home for some hours, removed the laudanum from its place and administered to the prisoner's child a much larger dose of it than a teaspoonful, and the child died in consequence.

The jury were directed that if the prisoner delivered to Sarah Stephens the laudanum, with intent that she should administer it to the child and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that if the (prisoner's original intention still continuing) the laudanum was afterwards administered by an unconscious agent, the death of the child under such circumstances was murder on the part of the prisoner.

They were directed that if the teaspoonful of laudanum was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

The jury found the prisoner guilty. The judgment was respited, that the opinion of the judges might be taken, whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

This case was considered by all the judges (except Gurney B. and Maule J.) in Easter term 1840, and they were unanimously of opinion that the conviction was right.

Watson v. State, 1 S. W. 451; *Collins v. State*, 3 Heisk 14; *Gregory v. State*, 26 Ohio St. 510; *Adams v. People*, 1 N. Y. 173; *Com. v. Hill*, 11 Mass. 136; *Rountree v. State*, 10 Tex. App. 110; *Cook v. State*, 14 Tex. App. 96; *Pinkard v. State*, 30 Ga. 757; *Berry v. State*, 4 Tex. App. 492; *Sharp v. State*, 6 Tex. App. 650; *Boze Smith v. State*, 37 Ark. 274; *Clark*, p. 83; *Bishop I.*, Sec. 648; *Wharton*, 206; *Hawley & McGregor*, p. 80.

(b) Principals of the Second Degree.

Principals of the second degree are those actually or constructively present aiding or abetting the act.

COLLINS *v.* THE STATE.

Supreme Court of Georgia, 1892.

88 Ga. 347; 14 S. E. 474.

SIMMONS, Justice.

Stephen Custer and Rufus Collins were indicted for murder. There were two counts in the indictment. The first count charged

them both as principals; the second charged Custer as principal and Collins as accessory before the fact. They severed on the trial, and Collins was tried first and convicted on the first count. He made a motion for a new trial, which was overruled.

1. One of the grounds of the motion relied upon for reversal of the judgment of the court below in refusing to grant a new trial, was, "that the evidence in said case was not sufficient to authorize his conviction on the first count in said indictment, and was insufficient to support the same." It was argued by learned counsel for the plaintiff in error that the evidence showed that Collins was either a principal in the second degree or an accessory before the fact, and he could not, therefore, be convicted upon the first count in the indictment, which charged him with being a principal perpetrator of the crime. Our Code (Sec. 4305), in defining principals in the first and second degree, says: "A person may be principal in an offence in two degrees. A principal in the first degree is he or she that is the actor or absolute perpetrator of the crime. A principal in the second degree is he or she who is present aiding and abetting the act to be done; which presence need not always be an actual, immediate standing by, within sight or hearing of the act; but there may be also a constructive presence, as when one commits a robbery, or murder, or other crime, and another keeps watch or guard at some convenient distance." The evidence on this point, in brief, is, that Collins, a white man, brought Custer, a negro boy about fifteen years old, from North Carolina to this State as a servant, and that while on their journey to this State, Collins told Custer that he wanted him to kill his (Collins') wife; and after reaching Gordon County in this State, he mentioned the subject to him upon several occasions, promising to pay him \$50 if he would kill her, and Custer finally consented; that upon the day of the homicide, Mrs. Collins called Custer to assist her in moving a mattress; that Custer was at that time at a distillery about fifty yards from the dwelling-house where Mrs. Collins was, and as he started to the dwelling-house, he passed Collins, who told him that the pistol was loaded, to snap it once, and the second time it snapped it would fire; that Custer went to the house, got the pistol from under the head of the bed, snapped it once in the front room, saw Mrs. Collins and snapped it at her, and it fired

then as Collins said it would. Collins did not go to the house with Custer, but remained at the distillery or grocery, about fifty yards from the house.

This evidence, if it be true, makes Collins at least a principal in the second degree, if not an "actor, or absolute perpetrator of the crime." He was not actually present in the house where the crime was perpetrated, but he was constructively present—sufficiently near to encourage by his presence the principal actor, and to assist him if assistance should become necessary. Confederacy with the absolute perpetrator of the crime, supplemented by constructive presence, makes one a principal in the second degree. 1 Whart. Crim. Law, Secs. 213, 218, 219; Kerr, Homicide, 110; 1 Bish. Crim. Law, Sec. 653; 2 Roscoe, Crim. Ev. p. *752; Desty, Amer. Crim. Law, Sec. 37a.

(a) Having shown that Collins was a principal, it is immaterial whether he was a principal in the first or second degree. There is no difference in this State between the punishment of a principal in the first degree and that of a principal in the second degree; and where this is true, it seems now to be well settled that there is no practical or material difference between principals of the two degrees, and a principal in the second degree may be convicted on an indictment charging him as principal in the first degree; in other words, an indictment charging one as principal in the first degree is supported by evidence showing him to be a principal in the second degree. This is especially true if the facts, as in this case, be such as that the act by which the crime is perpetrated would, on established principles of law, be imputed to him as committed by himself through the agency of another. 1 Bish. Crim. Law, Sec. 648; 2 Bish. Crim. Proc. Sec. 3; Desty, Amer. Crim. Law, Sec. 36a; 2 Roscoe, Crim. Ev. p. *752-3; *Hill v. State*, 28 Ga. 604; *Leonard v. State*, 77 Ga. 764; *Ferguson v. State*, 32 Ga. 658; *McGinnis v. State*, 31 Ga. 263; *Plain v. State*, 60 Ga. 284; *Dumas v. State*, 62 Ga. 58. The principle of the last four cases cited is that where persons conspire together to commit crime, and are present countenancing or aiding it, the act of each is the act of all. The cases of *Washington v. State*, 36 Ga. 222, and *Shaw v. State*, 40 Ga. 120, were relied upon by counsel for the plaintiff in error to establish his proposition that a principal in the second degree could not be convicted as

a principal in the first degree; but they do not establish his contention. They do not rule that a principal in the second degree cannot be convicted as a principal, but do rule that where a person is indicted as the actor or absolute perpetrator of the crime, he cannot be convicted as a principal in the second degree. In these cases the accused were indicted as principal in the first degree, and the jury found them guilty in the second degree, and the court held that this could not be done.

2. Another ground of the motion complains that the court erred in admitting certain testimony of Miller over the objection of the defendant. Miller testified that he heard Custer say that Collins hired him to kill his wife. This witness had testified as to what Custer told him when he arrested him, about the killing of Mrs. Collins, and that Custer said it was an accident, &c. Upon his cross-examination he was asked if he did not hear Custer say that Collins hired him to kill his wife, and he replied that he did in a subsequent conversation hear Custer make that statement. The record shows that this was not a part of the conversation which Miller had testified to in the direct examination, when he arrested Custer, but that it was a statement he heard Custer make upon a different occasion. If it had been part of the same conversation to which Miller testified in his direct examination, then of course the State would be entitled to bring out the whole conversation; but as this statement was in another conversation and upon a different occasion, it was clearly hearsay, and the court erred in not excluding it when it was objected to by the defendant on that ground.

3. The error above referred to is sufficient to authorize this court to grant a new trial; and we do so the more readily, because on reading the evidence in the record we are inclined to think that the whole story of Custer may have been a fabrication made by him under the influence of threats and coercion. Johnson, one of the witnesses and the magistrate who held the inquest, testified that he saw Custer upon the night he was caught, and he claimed then that the killing was an accident. This witness said: "I was at Plainville when they were pulling him. They told him to tell how much Collins was to give to him, or they would shoot him. He was badly scared, and he cried after they put him down. I did all that I could to save his life and get them

to put him down. I was surprised when he said he was hired to do it, and I never heard of his changing until he was frightened. He stated, after the crowd got hold of him, that he was hired to kill the woman. He said Collins was to give him \$50." Custer himself testifies that he "was very badly scared when the crowd had him." We think, in view of these facts, that the testimony of Custer, though self-criminating, may be a fabrication. The record shows that he was an ignorant colored boy about fifteen years old, and that he first said the shot was fired accidentally. He ran off, and after a day or two was apprehended by the witness, Miller, who took him to a neighbor's house, where, after being cautioned to tell the truth, he made the same statement, and gave all the details of the shooting which went to show that it was an accident. The record does not show that he ever made any other statement than that it was an accident, until the crowd took him the next morning and "pulled" him, and threatened to shoot him if he did not tell how much Collins agreed to pay him for killing his wife. He then for the first time said that Collins had hired him to kill her for \$50. It is true he adhered to this story on the trial and while under the protection of the court, but if it was a fabrication in the first instance, induced by threats and coercion, it is possible that in adhering to it he may still have been influenced in some degree by the same motives. However that may be, we think from the general countenance of the case that the defendant is entitled to a new trial.

Judgment reversed.

Com. v. Knapp, 9 Pick. 494; *McCarty v. State*, 26 Miss. 299; *Breese v. State*, 12 Ohio St. 146; *State v. Hamilton*, 13 Nev. 386; *State v. Jones*, 83 N. C. 605; *State v. Valwell*, 66 Vt. 558; *Howard v. Com.*, 27 S. W. 854; *People v. Repke*, 61 N. W. 861; *State v. Paxton*, 29 S. W. 705; *Williamson v. State*, 29 S. W. 470; *State v. Jones*, 82 N. C. 681; *Doan v. State*, 26 Ind. 495; *Clark*, p. 84; *Bishop I.*, Sec. 648; *Wharton*, Sec. 211; *Hawley & McGregor*, p. 81.

NOTE.—This distinction was only made in felony. In treason and misdemeanor it was unknown; in the former because of the enormousness of the offence all were principals, and in the latter because of the minor character of the offence, the law did not consider the shades of guilt.

Winnard v. State, 30 S. W., 555; *Stevens v. People*, 67 Ill. 587; *Stratton v. State*, 45 Ind. 468; *Lowenstein v. People*, 54 Barb. 299; *Van Meter v. People*, 60 Ill. 168; *Faircloth v. Georgia*, 73 Ga. 426; *Com. v. McAtee*, 8

Dana 28; Clark, p. 84; Bishop I., Sec. 648; Wharton, 211; Hawley & McGregor, p. 80.

NOTE.—Some States make all principals, principals of the first degree.

Minn. Stat. 1894, Sec. 6310; N. Y. Penal Code, Sec. 29; *State v. Beebe*, 17 Minn. 241; *State v. Pugsley*, 38 N. W. 498; *Territory v. Guthrie*, 17 Pac. 39; *Blain v. State*, 7 S. W. Rep. 239; *Weston v. Com.*, 2 Atl. 191.

NOTE.—The distinction is no longer of any practical importance; one needs to know of the distinction simply in order to interpret the language of the codes.

Bishop Cr. Law, Sec. 648; Hawley & McGregor, p. 80.

(2) *Accessories.*

Accessories are those who, without being present, either actually or constructively, aid or assist in the crime, either before or after its commission.

(a) *Accessories Before the Fact.*

Accessories before the fact are those who without being actually or constructively present, procure, counsel, aid or command another to commit the crime.

PEOPLE *v.* KATZ.

Supreme Court of New York, 1862.

23 How. Pr. 93.

WRIT of error to the court of Oyer and Terminer. On the 11th of December, 1860, Simon Katz was indicted in the New York Oyer and Terminer for arson in the first degree, in setting fire to the dwelling house (the lower part being used as a grocery), corner of Attorney and Division streets in that city. The case was tried in January, 1861, in the Oyer and Terminer, Judge Leonard presiding. On the trial Louis Katz, a nephew of the prisoner, a boy about seventeen years of age, was the principal witness for the people.

It was claimed by the district attorney that the motive of the prisoner was to obtain of the insurance company the amount for which he was insured. The boy Louis, who swore that he set fire

to the building in the night-time, at the instigation of the defendant, testified that he was always on the best of terms with his uncle, and never entertained toward him any ill-will. On the part of the defence quite a number of witnesses were called, who testified that Louis had previously exhibited toward the prisoner the utmost ill-will, and had often threatened revenge. The trial resulted in a verdict of guilty.

The prisoner's counsel, in the course of the trial took exceptions to the decisions of the court in the admission of evidence, and to the charge of the court to the jury. The only point argued was as to the error of the judge upon the trial, in charging the jury that they might convict the prisoner upon an indictment charging him as a principal, although he was absent at the time the premises were set on fire.

By the court, Sutherland, Justice. In indicting, trying and punishing persons who commanded or procured a murder or felony to be committed by another, and were absent when the crime was committed, the common law did not recognize or adopt the principle or relation of principal and agent, but that of principal and accessory, when the person or agent who actually committed the crime was criminally responsible for the crime. (1 Hale, 233, 615; Barb. Cr. L., 2d ed., 281-2; Wheaton's Cr. L., 4th ed., 112, Sec. 134.) This common law principle, and the distinction between principals and accessories before and after the fact, is recognized by the Revised Statutes. (2 R. S., 698, Sec. 67, 1st ed.; id., 727, Secs. 48, 49; id., 665, Sec. 31; see also *People v. Bush*, 4 Hill, 133; *People v. Adams*, 3 Denio, 190; S. C. 1 Comst. 173.) In misdemeanors, the act or crime may be charged as the act or crime of the party procuring or commanding it to be done without reference to the agency.

An accessory before the fact is one who procures or commands the felony to be committed, though not present at the time of its commission. (1 Hale, 615.) Although an accessory before the fact, upon conviction, is liable to be punished in the same manner as the principal in the first degree (2 R. S., 698, Sec. 6), yet the distinction between principals and accessories is not one of form merely, but is material and founded on principle, and relates to the regularity of criminal proceedings, and therefore one in-

dicted as principal cannot be convicted on testimony showing him to have been only accessory before the fact. (1 Bish. Cr. L., 542; 1 Arch. Cr. Pr. & Pl., 2d ed., 73; Wharton's Cr. L., Sec. 114; *Baron v. People*, 1 Parker Cr. R., 250; *Norton v. People*, 8 Cowen, 137.)

The plaintiff in error in the present case was indicted as a principal for arson in the first degree. The indictment charged that he, on the 29th day of October, 1860, in the night-time, set fire to an inhabited dwelling-house in the city of New York. Louis Katz, a boy then in his seventeenth year, and a nephew of the prisoner, testified that between ten and eleven o'clock on the night of the 29th of October, he, in pursuance of instructions of the prisoner, and in his absence, set fire to the building in question, the lower part of which was occupied by the prisoner as a grocery store—the upper part was used as a dwelling. All the testimony showed that the prisoner was absent when the premises were fired. It was proved, on the part of the people, that the prisoner left his store at eight o'clock that evening, and did not return there again that night. There was no evidence that the boy Katz, who actually fired the building, was insane or otherwise criminally irresponsible for the crime. The judge substantially charged that, although the prisoner was absent at the time of the fire, yet if he instigated Katz to commit the crime in his (the prisoner's) absence, he (the prisoner) might be convicted under the indictment. Indeed, the whole charge was upon the theory that the prisoner might be convicted as principal, though absent, if he procured or directed the boy Katz to commit the crime. To this charge the prisoner's counsel excepted. The counsel for the prisoner also requested the court to charge that under the indictment the prisoner could not be convicted unless the evidence showed that he personally fired the building, or was present aiding or abetting. The judge refused so to charge, and the prisoner's counsel excepted.

It is plain on the testimony in this case, that the boy Katz was criminally responsible, and might have been indicted, tried and convicted as principal. He was sixteen years old, and from aught that appears from the testimony, of ordinary intelligence. He had but recently arrived in this country, and no doubt, under the circumstances, was very likely to be influenced by his uncle, the

prisoner; but he would not be permitted to plead ignorance of the law, or his uncle's influence or authority, in bar of an indictment. Although he may have been ignorant of the extent of the punishment for the crime, yet it appears from his own testimony that he knew he was doing wrong; that the act would endanger the lives of others, and that he hesitated about its commission.

It follows that the prisoner was an accessory before the fact merely, and could not be convicted under the indictment against him as principal, and that the judgment of the Oyer and Terminer should be reversed.

State v. Ayers, 8 Baxter 96; *Norton v. People*, 8 Cow. 137; *Woolweaver v. State*, 50 Ohio St. 277; *Com. v. Hollister*, 157 Pa. St. 13; *Sloan v. Com.*, 23 S. W. 676; *Smith v. State*, 37 Ark. 274; *People v. Hodges*, 27 Cal. 340; *State v. Orrick*, 17 S. W. 176; *State v. Payne*, 1 Swan 383; *Williams v. State*, 47 Ind. 568; *Baker v. State*, 12 Ohio St. 214; *Clark*, p. 81; *Bishop I.*, Sec. 662-672; *Wharton*, 225; *Hawley & McGregor*, p. 82; *The Penal Code of Pa.*; *Shields*, vol. I., 233, 404, 417, 419, 427, 453, 517, 562; vol. II., 622, 669, 670.

(b) Accessories After the Fact.

An accessory after the fact is one who knowing that a felony has been committed, aids the escape, or hinders the conviction of the felon.

STATE v. PAYNE.

Supreme Court of Tennessee, 1852.

1 Swan, 383.

GREEN, J., delivered the opinion of the court.

The indictment in this case charges, that David, a negro slave, the property of Daniel McCarn, made an assault upon Elizabeth McCarn, a free white woman, with intent to kill and murder her; and that Daniel McCarn moved, incited and commanded the said negro man, David, before the making the said assault, to commit the same, and that the prisoner, George Payne, knowing that said

Daniel McCarn had moved and incited the said negro, David, to commit the said assault, did harbor and conceal, aid and comfort the said Daniel McCarn.

On motion of the defendant, the Circuit Court quashed this indictment, and the attorney general appealed to this court.

There is no objection to this indictment, as to matter of form; but it is insisted, that by our law, a party is not indictable as an accessory of an accessory to a felony.

It is not denied, that at the common law, there might be an accessory to an accessory before the fact, but it is said, our statutes provide no punishment for the offence.

Chitty, in his Criminal Law, says (vol. 1, p. 225), "There may be an accessory to a person, who was accessory before the fact, as if A. advise and procure B. to murder C., by this A. is accessory before the fact, and though but accessory, yet if D. receives and conceals him from justice, D. thereby becomes an accessory, but there cannot be an accessory to a person who was accessory after the fact." See also, 3 P. Williams, 475.

Indeed, it would be most unreasonable, to hold that there could be no accessory after the fact, to a person who was an accessory before the fact, for it often happens that the accessory before the fact is much more guilty than the principal felon. Of this remark, the present case is an illustration. If McCarn commanded his slave to commit the assault charged, he is the most guilty felon of the two; and surely he who aids his escape, and conceals him from justice, is as guilty as he would be if McCarn had made the assault in person.

There is, therefore, no ground for quashing the indictment, even if there be doubt as to whether the case falls within the 64th section of the Penitentiary Code. But, if there be an accessory after the fact, to one who was an accessory before the fact, such accessory before the fact, is principal to the party who thus conceals and secrets him. The 64th section of the act of 1829, chap. 23, says, "All accessories after the fact shall be punished as their principal, except, etc." The act does not say that they shall be punished as the principal felon in the transaction, but that they shall be punished as "their principal"—which means, the person to whom they have given aid and comfort.

Reverse the judgment, and remand the prisoner for trial.

People v. Gassaway, 28 Cal. 405; *Tarpe v. State*, 20 S. E. 217; *State v. Empey*, 79 Ia. 460; *Harrell v. State*, 39 Miss. 702; *Wren v. Com.*, 26 Grat Va. 952; *Com. v. Filburn*, 119 Mass. 297; *Tully v. Com.*, 11 Bush (Ky.) 154; *White v. People*, 81 Ill. 333; *Clark*, p. 95; *Bishop I.*, Sec. 692; *Wharton*, 241; *Hawley & McGregor*, p. 86.

NOTE.—A wife is not liable as an accessory after the fact when her husband is principal. No other relation affords a protection.

State v. Kelly, 74 Ia. 589; *Clark*, p. 97; *May*, Sec. 34; *Wharton*, Sec. 243; *Hawley & McGregor*, p. 90.

NOTE.—An accessory cannot be convicted of a higher offence than the principal and the acquittal of the principal prevents the conviction of the accessory.

McCarty v. State, 44 Ind. 214; *Buck v. Com.*, 107 Pa. St. 486; *Com. v. Phillips*, 16 Mass. 423; *State v. McDaniel*, 41 Tex. 229; *May*, Sec. 31; *Wharton*, Sec. 244.

Contra.—*State v. Whitt*, 18 S. E. 715; *State v. Bogue*, 34 Pac. 410; *Minn. Stat. 1894*, Sec. 6313.

NOTE.—Statutes in many States make all principals, principals of the first degrees; leaving of joint criminals only principals of the first degree and accessories after the fact.

Minn. Stat. 1894, Sec. 6310, 6311; *N. Y. Penal Code*, Sec. 30; *State v. Fredericks*, 85 Mo. 145.

NOTE.—Statutes in some States make it possible to convict the accessory though the principal has not been arrested, tried or convicted.

Buck v. Com., 107 Pa. St. 486; *State v. Bogue*, 52 Kan. 79; *State v. Patterson*, 52 Kan. 335; *State v. Whitt*, 18 S. E. 715; *Minn. Stat. 1894*, Sec. 6311-6313; *N. Y. Penal Code*, Sec. 32.

C.

Attempts.

“An attempt is an act done in part execution of a design to commit a crime.”

PEOPLE v. GARDNER.

Court of Appeals of New York, 1894.

144 N. Y. 119; 38 N. E. 1003.

EARL, J. The defendant was indicted and upon his trial convicted of an attempt to commit the crime of extortion in the city of New York on the 4th day of December, 1892, by attempting

to obtain \$150 from Catharine Amos by threatening to accuse her of keeping a house of prostitution. The following are the sections of the Penal Code under which he was convicted: Section 552, "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right;" Sec. 553, "Fear, such as will constitute extortion, may be induced by a threat" (among other things) "to accuse a person of any crime;" Sec. 34, "An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime;" Sec. 685, "A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself."

Catharine Amos, who was the principal witness for the People, testified that for nine years she had been the keeper of a house of prostitution in the city of New York, and that the defendant, in December, 1892, came to her and agreed with her that if she would pay certain sums of money to him, and especially the sum of \$150, he would not accuse her of the crime, and that from October 19th, 1892, to December 4th, 1892, she had been acting as a decoy of the police and trying to induce the defendant to receive money from her under such circumstances as would render him guilty of a crime and enable the police to arrest and convict him of it.

The evidence tended to show the existence of every element constituting the crime of extortion except that Mrs. Amos in paying the money exacted by the defendant was not actuated by fear.

It is urged on behalf of the defendant that the fact that his threats did not inspire fear inducing any action on the part of Mrs. Amos, an element essential to constitute the completed crime of extortion, renders it impossible to sustain an indictment and conviction for the lesser crime of an attempt at extortion; and so a majority of the judges constituting the General Term held. We are of opinion that those learned judges fell into error.

The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed,

to effect its commission, and, therefore, the act was plainly within the statute an attempt to commit the crime. The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been and probably would have been consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. This crime as defined in the statute depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced. As said in *People v. Moran* (123 N. Y. 254), where the defendant was convicted of an attempt to commit the crime of larceny by thrusting his hand into the pocket of a woman which was not shown to contain anything, "the question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. * * * An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition." In *Commonwealth v. Jacobs* (9 Allen, 274) the defendant was convicted of soliciting a person to leave the commonwealth for the purpose of enlisting in military service elsewhere, although such person was not fit to become a soldier, and there it was said: "Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." It is now the established law, both in England and in this country, that the crime of attempting to commit larceny may be committed, although there was no property to steal, and thus the full crime of larceny could not have been committed. (*Reg. v. Brown*, L. R. [24 Q. B. Div.] 357; *Reg. v. Ring*, 66 Law Times R. 300; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *State v. Wilson*, 30 Conn. 500; *Clark v. State*, 86 Tenn. 511; *State v. Beal*, 37 Ohio St. 108;

Rogers v. Commonwealth, 5 S. & R. 463; Hamilton v. State, 36 Ind. 280.) In Rex v. Holden (Russ. & Ry. 154) it was held on an indictment under a statute against passing or disposing of forged bank notes, with intent to defraud, that it was no defence that those to whom the notes were passed knew them to be forged, and, therefore, could not be defrauded. In Reg. v. Goodchild (2 Carr. & Kir. 293) and Reg. v. Goodall (2 Cox Cr. C. 41) it was held under a statute making it a felony to administer poison or use any instrument with intent to procure the miscarriage of any woman, that the crime could be committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretences, although the person from whom the attempt was made knew at the time that the pretences were false, and could not, therefore, be deceived. (Regina v. Hensler, 11 Cox Cr. C. 570; Reg. v. Banks, 12 id. 393; Reg. v. Francis, Id. 613; Reg. v. Ransford, 13 id. 9; Reg. v. Jarman, 14 id. 112; Reg. v. Eagleton, Dearsly's Crown Cases, 515; Reg. v. Roebuck, D. & B. Cr. Cas. 24; Reg. v. Ball, 1 Carrington & Marshman, 249; People v. Stites, 75 Cal. 570; Hamilton v. State, 36 Ind. 280; People v. Bush, 4 Hill, 133; People v. Lawton, 56 Barb. 126; McDermott v. People, 5 Park. Cr. Cases, 104; Mackesey v. People, 6 id. 114.) And to the same effect are the text books on criminal law. (1 Bishop on Criminal Law, Sec. 723, *et seq.*) So far as I can discover there is absolutely no authority upholding the contention of the learned counsel for the defendant, that because the defendant did not inspire fear in the mind of Mrs. Amos by his threats, and thus could not have been guilty of the completed crime of extortion, therefore, he cannot be convicted of attempting to commit the crime. That contention is, as I believe, also without any foundation in principle or reason.

Therefore, upon the facts alleged in the indictment and appearing upon the trial, the defendant could be convicted of an attempt to commit the crime of extortion, and the General Term, in reversing the judgment, should not, therefore, have refused to grant a new trial and have discharged the defendant.

Our attention has been called on behalf of the defendant to many other exceptions taken by his counsel during the progress of the trial which, it is claimed, point out errors. We have ex-

amined all of them, but do not deem it important to call particular attention to but two.

Upon the trial it was proved that defendant and Mrs. Amos were together upon certain occasions having a material bearing upon the case, and a witness was called to identify the defendant as the person who was in her company at one of the times and places referred to. The witness was asked: "Do you know Mr. Gardner?" Answer: "I do not." Question: "Would you know him if you saw him?" Answer: "Yes, sir." Then the court directed the defendant to stand up. The defendant's counsel objected to his standing up, or that he should be compelled to stand up, or to testify against himself. The court replied: "The prisoner will rise; stand him up." And then, against the objection of his counsel, the defendant was forcibly compelled to stand up, and then he was identified by the witness. It is now claimed on his behalf that this action on the part of the court violated his constitutional rights by compelling him to be a witness against himself. (N. Y. Constitution, Art. 1, Sec. 6; U. S. Constitution, amendment 5.) We do not think that the defendant's constitutional right was violated, or that he was compelled, within the meaning of the constitutional provisions referred to, to give evidence against himself. He was bound to be in court and in the presence of the jury, the recorder and the witnesses who might be there. The recorder, the jurors and the witnesses had the right to see him, and he had the right to see them. It was necessary that he should be identified as the person named in the indictment and charged with the crime. His mere standing up did not identify him with the alleged crime, and did not disclose any act connected with the crime. There was nothing on his person or in his appearance that in any way connected him with the crime, or furnished any evidence whatever of his guilt. Suppose he had come into court with his face veiled, could not the recorder compel him to remove the veil that his face might be seen? Could he not compel him to remove his hat; to stand or sit in the prisoners' dock? In the examination of the witness could not the district attorney have pointed to the defendant and asked the witness whether he was the person he had seen with Mrs. Amos? Instead of compelling the defendant to stand up, could not the recorder have directed the witness to go to the place where he

was and look at him with the view of identifying him? If all these things could be done without violating the rights of the prisoner, how is it possible to say that he was harmed, or that his constitutional right was invaded by compelling him to stand up for the purpose of identification? For the orderly conduct of a criminal court it is requisite that the trial judge should have the power to say what place the prisoner shall occupy in the court room, and whether at any time he shall stand or sit, and be covered or uncovered; and he must have the power at all times to keep the prisoner within sight of the court, the jury, the counsel and the witnesses. The history of the constitutional provision referred to clearly demonstrates that it was not intended to reach a case like this. (Story's Con. Lim. Sec. 1788; 1 Steph. Hist. Cr. L. 440.) The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice. In *Rice v. Rice* (47 N. J. Eq. R. 559) Beasley, C. J., said: "That every court of judicature, as an indispensable attribute, is possessed of the power to require every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court or to the jury, if there be one, would not seem in any degree questionable. Without such exposure there would be no certainty who the person really was who assumed to act as party or witness. To order such persons to expose their faces to view is common usage in every court, and thus far the practice seems not to be open to any question." Our attention is called to authorities bearing more

or less upon the question we are now considering, and we find that they are not all harmonious. In *State v. Jacobs* (5 Jones [N. C.], 259) it was held that a judge has no right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro. There the defendant was indicted as a free negro for carrying arms, and it became necessary for the prosecution to show that he was a negro, and in that State a man was held to be a negro who had as much as one-sixteenth part of African blood in his veins. There the defendant was compelled to stand up that the jury might see whether he was a negro or not, and to determine that fact from their own observation. Thus there was a sense in which it could be said that the defendant was compelled to furnish evidence against himself upon a vital issue to be tried, and so that case is distinguishable from this. But no authority was cited to uphold that decision, and we entertain no doubt that it was erroneous. The judge writing the opinion said: "Admitting that the State has a right to compel his presence at the trial, it does not follow that he is bound to stand or sit within view of the jury." Can this observation be correct? Certainly, in this State it cannot be maintained that a prisoner, when on trial, could not be compelled to stand or sit in view of the jury. It is the right of the prisoner to be in the presence and view of the jury, and it is the right of the prosecution to have him in the view of the presiding judge and jury and the counsel engaged in the trial. And whether at any particular time he shall stand up or sit down in the presence of the jury must be a matter resting in the discretion of the trial judge, and in no sense can it be said that by the exercise of such discretion his constitutional right is involved.

In the case of the *State v. Johnson* (67 N. C. 55) the defendant was on trial for rape, and on the trial the prosecutrix was asked by the prosecuting attorney to look around the court room and see if she could identify the guilty party, and she pointed to the prisoner and said, "That is the black rascal." It was insisted that this was to make the prisoner furnish evidence against himself; that he had the right to be there and confront his accusers, and that for the State to take advantage of his presence to have him pointed out and identified placed him in the dilemma of

either abandoning his constitutional right to be present or of affording the means of his conviction by its exercise. The court held against this contention, and that no error was committed. Suppose in that case the court had placed the prisoner where he would have been conspicuously in view of the court, the jury and the witnesses, and the prosecutrix had then identified him, would his constitutional right have been invaded? And if he had been compelled to stand up would he have been compelled within the meaning of the Constitution, to give evidence against himself? We think not. We are, therefore, of opinion that no error was committed in the case in compelling the defendant to stand up for identification.

It appeared upon the trial by the witnesses for the prosecution, that prior to the time of the alleged offence the defendant was much in the company of Mrs. Amos; that he visited her at her house; that she visited him at his house; that he frequently rode with her through the streets of New York, and visited saloons and drank wine with her. These facts were proved on the part of the prosecution to show his relations with Mrs. Amos and his motives, and as links in the chain showing the commission of the alleged crime. The defendant offered to show by himself and other witnesses that in his relations with Mrs. Amos he was acting under the directions of officers of the Society for the Prevention of Crime, for the purpose of gaining her confidence and good will, and securing from her an affidavit which could be used for the arrest of a former agent of that society who was supposed to be engaged in extorting money from keepers of houses of prostitution by threats of prosecution, and the recorder excluded the evidence. It is now claimed that in such exclusion error was committed. We think the evidence should have been received. The defendant should have been permitted to prove that he acted under the general instructions of the Society of the Prevention of Crime whose agent he was, and that he reported his acts to its officers and followed their directions. Such proof would have had a tendency to put an innocent aspect upon his acts which would otherwise seem to be a part of the scheme to commit the crime with which he was charged. It is claimed on behalf of the People that the exclusion of this evidence was not harmful to the defendant as the facts

were nevertheless proved. We have carefully read all the evidence, and we are not satisfied that the defendant did not suffer harm from the rulings complained of. The recorder had laid down the law by these rulings, and the defendant did not have the benefit of the evidence offered in the submission of the case to the jury. The case went to the jury with the rulings of the recorder during the progress of the trial that that kind of evidence was incompetent and illegal.

Other things transpired during the progress of the trial to which our attention has been called, which, though not presenting legal errors which would call for a reversal of the judgment of conviction, were yet of such a character that they may have been harmful and probably were harmful to the defendant. We will not comment upon them, as they may not, and probably will not, appear upon another trial.

On account of the error above pointed out, while the General Term should have reversed the judgment below, it should also have granted a new trial.

Our conclusion, therefore, is that the order of the General Term should be so modified as simply to reverse the judgment of conviction and to grant a new trial.

All concur.

Ordered accordingly.

People v. Murray, 14 Cal. 159; *U. S. v. Pryor*, 3 Wash. C. C. 234; *People v. Moran*, 123 N. Y. 254; *Com. v. Jacobs*, 9 Allen 274; *State v. Jordan*, 75 N. C. 27; *Com. v. Tolman*, 149 Mass. 229; *Hamilton v. State*, 36 Ind. 280; *Mullen v. State*, 45 Ala. 43; *Barcus v. State*, 49 Miss. 17; N. Y. Penal Code, Sec. 34; Clark, p. 103 *et seq.*; Bishop, Sec. 723 *et seq.* 737; May, Sec. 18, 183; Wharton, Sec. 173; Hawley & McGregor, p. 90.

NOTE.—The act must be proximately connected with the ultimate result and not done in mere preparation for the final act.

Griffin v. State, 26 Ga. 493; *People v. Murray*, 14 Cal. 159; *U. S. v. Stephens*, 8 Sawy. 116; Bish. I., Sec. 764; Wharton, Sec. 178; Hawley & McGregor, p. 91.

NOTE.—A solicitation is not an attempt; nor is an endeavor to solicit indictable.

Smith v. Com., 54 Pa. 209; *Lamb v. State*, 67 Md. 524; *King v. Higgins*, 2 East 5; Clark, p. 115; Wharton, Sec. 179; Hawley & McGregor, p. 93, note; May, 185; Bishop I., Sec. 767.

NOTE.—The ultimate result must be such as can be apparently in the eyes of the law consummated by the person at the time the act is done in furtherance of it.

Reg. v. Brown, 24 Q. B. D. 357; *State v. Beal*, 37 Ohio St. 108; *State v. Wilson*, 30 Conn. 500; *Com. v. McDonald*, 5 Cush. 365; *People v. Moran*, 123 N. Y. 254; *People v. Jones*, 46 Mich. 441; *Clark v. State*, 86 Tenn. 511; *People v. Lee Kong*, 95 Cal. 666; *State v. Fitzgerald*, 49 Ia. 260; *Kunkle v. State*, 32 Ind. 220; *People v. Ryan*, 55 Hun. 214; *In re Lloyd*, 51 Kan. 501; *Cox v. People*, 82 Ill. 191; *Com. v. Harrington*, 20 Mass. 26; *Clark*, p. 109; *Bishop I.*, Sec. 746; *Hawley & McGregor*, p. 94; *May*, 184; *Wharton*, Sec. 183.

d.

Conspiracies.

A conspiracy is an agreement or co-operation of persons in accomplishing an unlawful purpose, or a lawful purpose by unlawful means.

The agreement perfects the offence, and it is not necessary by the common law to prove an overt act in order to secure a conviction for conspiracy.

THOMPSON *v.* STATE.

Supreme Court of Alabama, 1895.

106 Ala. 67; 17 So. 512.

BRICKELL, C. J. The indictment contains two counts, the first charging that the defendants "conspired together to unlawfully take one thousand dollars in money, the property of Julius C. Hudspeth, from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same." The second count charged that the defendants "unlawfully conspired together to unlawfully, and with malice aforethought, kill Julius C. Hudspeth." On the trial the State voluntarily elected to prosecute only for the offence charged in the first count, thereby, for all the purposes of the trial, eliminating the second count as effectually as if it had not formed part of the indictment; and it is the sufficiency of the first count,

alone, which is now open for consideration. The offence, the commission of which is averred to have been the purpose of the conspiracy, is described in the count in the words of an indictment for robbery, as prescribed by the Code (Cr. Code, p. 276, form 76); and in other respects the count is in close analogy to the form prescribed for a conspiracy to murder (Id. p. 269, form 29). The statute prescribing forms of indictment declares that the forms are sufficient in all cases to which they are applicable, and that in other cases analogous forms may be used. Id. Sec. 4899. The demurrers to the count were not well taken, and were properly overruled. 3 Brick. Dig. pp. 279, 280, Secs. 447-449.

It is a very general rule, applicable alike in civil and criminal cases, that if a witness has given testimony, in the course of a judicial proceeding between the parties litigant, before a competent tribunal, and subsequently dies; or, if not dead, becomes insane; or, after diligent search, is not to be found within the jurisdiction of the court; or if that which is equivalent be shown, that he has left the State permanently, or for such an indefinite time that his return is contingent and uncertain,—it is admissible to prove the substance of the testimony he gave formerly. 1 Whart. Ev. Secs. 177-180; 1 Greenl. Ev. Secs. 163-166; 1 Brick. Dig. p. 878, Secs. 1064-1072; 3 Brick. Dig. p. 441, Secs. 523-533; *Lowe v. State*, 86 Ala. 47, 5 South. 435; *South v. State*, 86 Ala. 617, 6 South. 52; *Perry v. State*, 87 Ala. 30, 6 South. 425; *Pruitt v. State*, 92 Ala. 41, 9 South. 406; *Lucas v. State*, 96 Ala. 51, 11 South. 216. The rule is founded upon a principle of necessity, rather than upon any ideas of mere convenience. Parties should not lose the benefit of evidence taken on a former trial, when the same issues were involved, and there was full opportunity of examination and cross-examination, because events or contingencies have arisen which render the personal presence of the witness impossible, or, if possible, his examination impracticable, or because the witness is without the jurisdiction of the court, and his personal presence cannot be compelled. The rule is, however, exceptional, and it is essential to the admissibility of the evidence that some one of the contingencies which are deemed to create the necessity be satisfactorily shown. In the present case the fact which was supposed to authorize the introduction of the evidence given by the wit-

ness on the preliminary examination before the justice of the peace was his absence from the State at the time of the trial. The evidence was, without conflict, that the witness was a minor, and his home was with his father, in the county in which the trial was had, and that when he left home, but a short time before the trial, for the State of Florida, it was avowedly for a mere temporary purpose, and with the intent of returning to the term of the court at which the trial was had. The opposing evidence is that of a witness who, two days before the trial, saw the witness in Florida, and he declared that he had a job of work, and intended to remain, and was not coming to court. The reasonable hypothesis the evidence supports is not that the witness had permanently abandoned, or intended a permanent abandonment of his home in this State; that his absence was merely temporary. Though the time of returning is not shown affirmatively, it is not shown to have been uncertain and contingent. There was no duty resting upon the witness to return to that term of the court, or to be present at the trial of the case. He had not been summoned, nor was he under bond for appearance, so far as it is shown, nor had the State any reason to expect his appearance or presence. We are not of opinion that an event or contingency was shown which authorized the introduction of the evidence the witness had given on the preliminary examination before the justice of the peace. We deem it proper to say that it was not an objection to the admissibility of the evidence that the justice of the peace had not reduced to writing the examination of the witness, as is required by the statute. The neglect of the justice to perform this duty cannot prejudice the parties, nor does it lessen or add to the tests upon which the admissibility of the testimony depends. Nor was the evidence inadmissible because the magistrate could not, and did not assume to, repeat the precise words of the witness. All that was essential was that he should remember and state the substance of what the witness had testified to formerly,—the substance of the examination by the State, and of the cross-examination by the defendants. *Gildersleeve v. Caraway*, 10 Ala. 260; *Davis v. State*, 17 Ala. 354. We may remark that if, on a succeeding trial, the witness should be absent, and the introduction of his evidence on the preliminary examination before the justice is deemed material, its admissibility will depend on the state of facts then existing.

The instruction given by the court touching a reasonable doubt which requires an acquittal of a criminal charge is clear and precise, and in accordance with all authority. Though an exception was reserved to it, in the argument of counsel here its correctness is not questioned. Instructions requested must be clear, precise statements of the law applicable to the evidence; must be free from involvement or obscurity, of all tendency to mislead or confuse the jury; must not be invasive of the province of the jury, or argumentative. If subject to any one of these objections, there is no revisable error in refusing them.

The first instruction requested by the defendants not only gives undue prominence to the evidence of the witnesses who were named in it, but was invasive of the province of the jury to consider the testimony of these witnesses in connection with all the evidence which had been introduced touching the facts to which they testified. The precise meaning or purpose of the second instruction is not clear. Time and place are material inquiries on every criminal trial. The burden rests on the State to prove that the offence charged was committed within the county in which the venue is laid, and within a time to avoid the bar of the statute of limitations. The burden is not increased, whatever may be the nature or character of the defence. It is not, of consequence, true, as a legal proposition, as this instruction asserts, or as it would probably have been by the jury construed to assert, that time and place became a material inquiry only when an alibi was interposed as a defence.

The third instruction is founded in a misconception of the offence charged, and is not, in any of its postulates of fact, well founded. A conspiracy is, in and of itself, a distinct, substantive offence,—complete when the corrupt agreement is entered into. The agreement is the gist of the offence. It is not necessary that any act should be done in pursuance of the agreement, nor is the offence purged because subsequent events may render the consummation of the agreement impossible, or because the conspirators are entrapped into an attempt at its consummation.

The fourth instruction assumes as matter of fact that which it was the province of the jury to ascertain and determine,—that, to employ its own words, the recollection of the witnesses as to the testimony given by Dykes on the preliminary examination

before the justice was "indistinct as to a great deal of his testimony." Besides, in form and expression, the instruction was a mere argument.

The fifth, eighth, and ninth instructions may be considered together, and each is subject to kindred objections. The indictment charges the offence to have been committed in Henry County, and includes the charge that the time of its commission was within 12 months prior to its finding. These were the facts the State was under the burden of proving. There was no burden resting upon it to prove that the conspiracy was formed at the time or place stated in the fifth and eighth instructions. These instructions confound the allegations of the indictment with the evidence which the State introduced. They are wanting in clearness and precision, and were calculated to mislead or confuse the jury. The ninth affirms that the State had elected to prosecute on the testimony of a particular witness, and of such election the record furnishes no evidence, unless it be inferred from the tendencies of the evidence the State introduced.

The sixth instruction is subject to the objection that it gives undue prominence to the testimony of particular witnesses.

The offence charged against the defendants was the conspiracy,—not any act done or attempted in its consummation. Of the fact of the conspiracy,—of the corrupt agreement,—the evidence must have satisfied the jury beyond a reasonable doubt; and, if the jury could reconcile all the criminating evidence on a reasonable hypothesis consistent with the innocence of the defendants, it was a duty to adopt that hypothesis. This is far from being the proposition asserted in the seventh instruction, which mingles the evidence touching the going to Hudspeth's house after the conspiracy was formed, and the evidence of the conspiracy, and then, in the alternative, requires an acquittal if the jury could account for the evidence of either on a reasonable hypothesis consistent with the innocence of the defendants. It may be, the jury could account for the fact that the defendants went to Hudspeth's house on some reasonable hypothesis consistent with their innocence, and yet be unable to reconcile all the criminating evidence touching the conspiracy on any reasonable hypothesis consistent with innocence. Yet, framed as the instruction is, in that event the jury would have been under the duty of

acquittal. The only importance of the fact that the defendants went to Hudspeth's house lies in its tendency to corroborate the evidence of the conspiracy. There is no aspect in which the instruction can be considered as correct, and it was properly refused.

It is insisted that the tenth instruction ought to have been given, because there is an absence of evidence to support the averment of the indictment that the object or purpose of the conspiracy was to rob Hudspeth of \$1000. An indictment for a conspiracy to do an act which is a well-known felony or misdemeanor at common law is sufficient if it describes or avers in general terms the felony or misdemeanor intended to be committed. The nature of the offence, by such averment or description, is clearly indicated, and all beyond is mere matter of evidence or surplusage. 1 Bish. Cr. Proc. Sec. 516; 4 Am. & Eng. Enc. Law, 623; 3 Greenl. Ev. Sec. 395; *Com. v. Eastman*, 1 Cush. 189. It was immaterial whether the purpose of the conspiracy was to rob Hudspeth of \$1 or of \$1000. The degree of the guilt of the accused was not lessened or increased because of the insignificance or the magnitude of the value of that which it was intended to acquire by the robbery; and, if this were an indictment for robbery, it would not be necessary to prove the precise sum averred to have been taken from the person of the party robbed. 3 Greenl. Ev. Sec. 224; 1 Bish. Cr. Proc. Sec. 579. The averment of the indictment, in the particular we are considering, belongs to that class of averments which are not descriptive of the fact or character of the offence, and are not required to be proven with any degree of precision. 1 Greenl. Ev. Sec. 65; 1 Bish. Cr. Proc. Sec. 579.

We are without a statute declaring a conspiracy formed in this State to commit a felony or a misdemeanor in a sister State an indictable offence, as we are without a statutory declaration of the elements or constituents of a criminal conspiracy. The Criminal Code declares the punishment to be inflicted for the offence of a conspiracy to commit a felony or a misdemeanor, and, it may be, refers exclusively to a conspiracy in this State to commit within the State a felony or misdemeanor, as the Code defines these offences. But the doctrine has long been established, in civil and criminal cases, that the common law, so far as adapted to our condition, consistent with our institutions, and unaffected

by legislation, prevails here. 1 Brick. Dig. p. 349, Secs. 1-12. In *Pierson v. State*, 12 Ala. 149, it was held that the common law of this State on the subject of homicide is derived from, and the same as, the common law of England. The criminating element and constituent of an indictable conspiracy is the vicious, unlawful combination, the corrupt and corrupting agreement; and wherever the common law prevails, if the combination is formed, and the agreement entered into, to commit a known felony, *malum in se*, the offence is complete. There needs no overt act,—no effort at consummation. The combination and agreement are of the essence, the gist of the offence; and as a distinct, substantive offence, it is then committed. The place at which it is intended to commit the felony is not material. It is the law of the place where the conspiracy is formed which is broken. A conspiracy, at common law, is a misdemeanor; and the Code provides the punishment which is to be inflicted on conviction of a misdemeanor, at common law, the punishment of which is not otherwise particularly specified. It is apparent from our legislation, and its history, that the legislative intent is to preserve, not to impair or abrogate, the common law, so far as it may relate to civil rights, or to crimes, is adapted to our condition, and not inconsistent with our institutions, except in so far as it is superseded by express or repugnant legislation. Considering, and expressing an opinion only on, the precise question the record presents, we have no hesitancy in declaring that it is an indictable common-law misdemeanor to enter into a conspiracy in this State to commit a known common-law felony, *malum in se*, in a sister State. 1 Russ. Crimes, 967; 1 Whart. Cr. Law (9th Ed.) Sec. 287; 1 Bish. Cr. Law (7th Ed.) Sec. 111; *State v. Chapin*, 17 Ark. 561; *Ex parte Rogers*, 10 Tex. App. 655; *Johns v. State*, 19 Ind. 421. For the error pointed out the judgment must be reversed, and the cause remanded. The defendants will remain in custody until discharged by due course of law.

State v. Buchanan, 5 Har. & J. 317; *U. S. v. Walsh*, 5 Dill 58; *U. S. v. Barrett*, 65 Fed. 62; *United States v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333; *Seville v. State*, 49 Ohio St. 117, 15 L. R. A. 516; *Toledo & R. R. v. Penn. Co.*, 54 Fed. Rep. 730, 19 L. R. A. 387; *U. S. v. Cassidy*, 67 Fed. 698; *McKee v. State*, 3 Ind. 378; N. Y. Penal Code, Sec. 168; Minn. Stat.

1894, Sec. 6423; Clark p. 117; Bishop I., Sec. 592; Hawley & McGregor, p. 99; May, 186; Wharton, Sec. 1337-1407; The Penal Code of Pa.; Shields, vol. II., 816 to 820.

NOTE.—Some States by statute make an overt act necessary to complete a conspiracy while others do not require it when the contemplated act is a felony on the person of another, arson or burglary.

U. S. v. Barrett, 65 Fed. 62; U. S. v. Wilson, 60 Fed. 890; People v. Flack, 125 N. Y. 324; People v. Sheldon, 39 N. Y. 251; U. S. v. Lancaster, 44 Fed. 896; U. S. v. Cassidy, 67 Fed. 698; Pettibone v. U. S. 148 U. S. 197; N. Y. Penal Code, Sec. 171; Minn. Stat. 1894, Sec. 6425; Clark, p. 125; May, 192.

NOTE.—Husband and wife cannot be convicted of conspiracy being one at common law.

People v. Miller, 82 Cal. 107; Clark, p. 118; Wharton, Sec. 1392; Hawley & McGregor, 101, 102.

e.

Solicitations.

To solicit one to commit an act, which is a felony or a breach of the peace, is of the nature of an attempt and is a criminal act.

STATE v. BOWERS.

Supreme Court of South Carolina, 1891.

35 S. C. 262; 14 S. E. 488.

MR. CHIEF JUSTICE McIVER. The defendant was indicted for soliciting another to commit the crime of arson, the charge in the indictment being that the defendant "willfully, unlawfully, and maliciously did solicit, entice, and endeavor to persuade one Thompson Mayer feloniously, willfully, and maliciously to set fire to and burn down a certain house, to wit, the dwelling house of one Anderson G. Mayer, situate in the county and State aforesaid, by offering to pay him, the said Thompson Mayer, a certain sum of money, to wit, ten dollars, for so doing, and giving him the matches with instructions to use them in setting the said fire to the said house."

It is stated in the "Case" that defendant's counsel moved to quash the indictment, and it being admitted in the argument of that motion that the house had not been set on fire by said Thompson Mayer, the motion was granted. The Circuit Judge, however, in his report appended to the "Case," says the motion was not, in the first instance, a formal motion to quash the indictment, but rather a proposal to have the ruling of the court upon a conceded state of facts. Whereupon the Circuit Judge ruled as follows: "The indictment does not charge that money was given to Thompson Mayer as a bribe to burn the house of Andrew G. Mayer; nor does it allege that the solicitation was in any manner acceded to or accepted. There is no allegation that there was in any manner the slightest movement made by Thompson Mayer toward committing the proposed arson. It was conceded by the solicitor that he could not prove that the solicitation was accepted; but, on the contrary, it would appear in evidence that it was promptly rejected and exposed; that all that did occur was that Bowers promised to give Mayer ten dollars if he would burn the house, and handed him matches, with a request that he would burn the house, which request and promise were promptly refused, and that ended it." His honor held "that a naked solicitation, promptly rejected, is wanting in the essential elements of an attempt to commit a felony, and is not indictable." He therefore suggested that an order should be drawn quashing the indictment, which was accordingly done.

From this ruling and order the State appeals upon the several grounds set out in the record, which substantially make the single question whether solicitation to commit a felony, accompanied with an offer of a reward, and the furnishing of the means to the party solicited, of committing the proposed felony, does not constitute a criminal offence at common law, and as such is indictable in the Court of Sessions of this State. It is not denied that an attempt to commit a felony is an indictable offence, and therefore the inquiry here is narrowed down to the question whether soliciting another to commit a felony, accompanied by an offer of a reward and the delivery to the person so solicited of the means by which the felony may be committed, constitutes an attempt to commit a felony, where the offer is rejected and the means furnished are not used for the purpose indicated.

There is no doubt that there is some conflict of authority as to the question whether mere solicitation to commit a felony constitutes of itself an attempt to commit the felony, one of the leading text writers on criminal law, Wharton, denying the proposition, while another standard text writer, Bishop, supports it. But we need not go into that question here; for in this case the offence charged does not consist of mere solicitation to commit a felony, but it is accompanied with acts—offering a bribe and furnishing the means with which the felony could be committed; and we think it is abundantly shown by the analysis of the authorities presented in the argument of the counsel for the State, that where the solicitation to commit the felony is accompanied by such acts as are here charged, the decided weight of authority is in favor of the view that the offence is complete.

This is in accordance with reason as well as authority. There can be no doubt that a person may commit a felony either by his own hand or by the hand of another prompted or encouraged by him; and if he undertakes to commit a felony by his own hand, and his purpose is frustrated by the failure of the inanimate agencies which he employs to serve his felonious purpose, he would unquestionably be guilty of an attempt to commit a felony. Upon the same principle if, instead of undertaking with his own hand to effect his felonious purpose, he undertakes to employ the agency of another, furnishing him with the means requisite to effect his purpose, and offering him an inducement to do so, the fact that such agent fails him, will not relieve him from responsibility for that which he not only intended to have done, but which he took the necessary steps to accomplish. If the failure of the inanimate agency to effect the purpose which he desired and intended to accomplish will not relieve him from responsibility for the felonious act which he attempted to perpetrate by the use of such agency, we do not see why the failure of his animate agent to carry out the purpose which he desired him to effect and furnished him with the means of effecting, should relieve him from like responsibility.

There is, however, another view of this case, which will equally support the conclusion at which we have arrived. It will be observed that the indictment (the material part of which is set out above) contains no formal charge of the offence known as an

attempt to commit a felony, although it seems so to have been treated by the Circuit Judge, and hence we have so considered it in that light in what has been said above. On the contrary, the offence charged is the solicitation of another to commit a felony, which seems to be treated in some of the cases as a different offence from that of an attempt to commit a felony. In *Stabler v. Commonwealth* (95 Penn. St., 318; s. c., 40 Am. Rep., 653), the indictment contained several counts, of which only the first and sixth, upon which the conviction was had, need be noticed. In the first the defendant was charged with a felonious attempt to administer poison to one Waring with intent to commit the crime of murder; and in the sixth count he was charged with soliciting one Neyer to administer poison to said Waring. The testimony was that defendant solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward for so doing, and handing him the poison, with directions how to use it. Neyer declined to have anything to do with it, and handed the poison back to defendant. Upon this testimony the court, adopting the views of Wharton as indicated above, held that the conviction on the first ground could not be sustained, saying: "Merely soliciting one to do an act is not an attempt to do that act." But at the same time the court held that the conviction on the sixth count must be sustained, saying: "The conduct of the plaintiff in error as testified to by the witness undoubtedly shows an offence for which an indictment will lie without any further act having been committed."

In a note to the case just cited, the conflicting views of Wharton and Bishop above alluded to are stated, and several cases are cited showing that "solicitation to commit crime has often been punished as solicitation." We are also in standard authorities on criminal pleading forms of indictments for solicitation to commit a crime, as well as forms of indictments for attempts to commit felonies, which are distinct and different. Archbold's *Criminal Pleading*, 1st Am., from 1st Lond., ed., pages 238, 403; 2 Chitty *Criminal Law*, 50; and 3 Chitty, 807. If, therefore, the indictment in this case be regarded as an indictment for soliciting another to commit a felony, and not as an indictment for an attempt to commit a felony, we think it can be sustained if its allegations are established by the proof. *Rex. v.*

Higgins, 2 East, 5; *People v. Bush*, 4 Hill (N. Y.), 133; *State v. Avery*, 7 Conn., 266; and other cases cited in 1 Bishop Criminal Law, (7th ed.), Sec. 767 *et seq.*

It seems to us, therefore, that the Circuit Judge erred in his ruling and in granting the motion to quash the indictment.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for trial.

Com. v. Randolph, 146 Pa. St. 83; *Com. v. Flagg*, 135 Mass. 545; *Rex v. Higgins*, 2 East 5; *Clark* p. 115; *Bishop I.*, Sec. 767-768; *Wharton*, Sec. 179; *May*, 19, 184; *Hawley & McGregor*, p. 93.

f.

Consent.

Unless want of consent is an essential ingredient in the crime, consent is not a defence to any act which is a felony or a breach of the peace.

STATE v. BURNHAM.

Supreme Court of Vermont, 1884.

56 Vt. 445.

INDICTMENT for a breach of the peace. Trial by jury, December Term, 1883, Taft, J., presiding. Verdict, guilty.

The evidence for the prosecution tended to show that the respondent and one Bloxham engaged in a boxing match; that it was agreed upon three or four days in advance; that notice of it was given among the people; that one of the parties had a second and that a referee to superintend the encounter was chosen; that the Queensberry rules were to govern the contestants; that a crowd of from twenty-five to one hundred people were collected upon the fair grounds near the village, a ring made, and from four to six rounds were fought, during which the respondent and said Bloxham were engaged in assaulting and beating each other; that blood flowed from a wound on one of the parties, which the

respondent's testimony tended to show resulted from hitting an old wound on his head; that bruises made in the melee remained visible on the face of one of them the second succeeding day; that the thumb of one of them was sprained, and one of them knocked down.

The respondent's evidence tended to show that he went down to avoid the blows of his adversary.

The other facts are stated in the opinion.

The opinion of the court was delivered by

Ross, J. We have to consider this case as presented by the exceptions. It is true, as contended by the respondent's counsel, that sparring or boxing with gloves manufactured for that purpose, as conducted and engaged in ordinary athletic sports, is not unlawful, nor a breach of the peace. It may be that such sports, properly conducted, are both healthful and promotive of physical vigor and development, and should be encouraged. But such pugilistic exercise may be abused and carried beyond the limits of healthful and lawful exercise and sport. It may be so conducted as to create a breach of the peace. It may even degenerate into a prize fight. Many of the circumstances detailed in the exceptions, the agreement to engage in the match, giving notice, having seconds, a referee, rules, a ring, etc., are not inconsistent with lawful sport, nor yet with a breach of the peace. Neither is the fact that slight injuries were inflicted upon the contestants determinative of the character of the engagement. The court told the jury that if they found the facts, which the evidence tended to show, proven, they would be warranted in returning a verdict of guilty, although the combatants fought by consent. The court instructed the jury what would constitute a breach of the peace in a manner satisfactory to the respondent. He excepted to the charge on the subject of consent. The court did not withdraw from the jury the determination of whether what the evidence tended to show, would constitute a breach of the peace. It left that whole subject to the determination of the jury, with proper instructions on the subject of what would constitute a breach of the peace. The only question reserved was whether the consent of the combatants would prevent their acts from being a breach of the peace. Clearly, such consent would

not necessarily give character to their acts and prevent their becoming a breach of the peace. The conduct—quarreling, challenging, assaulting, tumultuous and offensive carriage, etc., which the statute declares to be a breach of the peace—is capable of being consented to by all the parties guilty of it. Consent, therefore, was not at all determinative of whether the respondent and Bloxham were guilty of a breach of the peace by their acts and conduct on the occasion complained of. The court were correct in instructing the jury that their consent to engage in such acts and conduct was not determinative of the quality of the same in regard to guilt or innocence. Their acts and conduct might have all the elements of a breach of the peace notwithstanding such consent.

Neither was the respondent entitled to have admitted the offered evidence, to show that such matches were common and harmless amusements, innocent and proper exercises, practiced in the universities and colleges in this country. Such evidence was not all determinative of, nor helpful in determining, the character and quality of the contest between the respondent and Bloxham, as conducted by them on the occasion complained of.

Nor was there error in not giving the huge boxing gloves to the jury to examine. Probably, if it had allowed the jury to make such examination, it would not have been error. Whether it would or would not order such examination was largely in the discretion of the County Court. The gloves furnished no criterion by which to judge of the character of the contest, nor of the manner in which it was conducted.

The result is that no error is found in the action of the County Court. If the jury, under proper instructions, have given a wrong character to the contest and conduct of the respondent, relief must be sought in some other manner than upon exceptions to correct rulings of the County Court. The result is, that judgment is rendered that no error is found in the proceedings of the County Court, that the exceptions are overruled, and judgment rendered on the verdict.

Com. v. Collberg, 119 Mass. 350; *Com. v. Parker*, 9 Met. 263; *Dutcher v. State*, 18 Ohio 308; *Johnston v. Com.*, 85 Pa. St. 54; *Tucker v. State*, 8 Lea 633; *Connor v. People*, 33 Pac. 159; *Clark*, p. 8; *Bishop I.*, Sec. 258-263; *May* 23, 208; *Wharton*, Sec. 142, 146; *Hawley & McGregor*, p. 41.

NOTE.—Want of consent being an essential ingredient of the crime, consent is a good defence.

Reynolds v. State, 42 N. W. 903; Oleson v. State, 9 N. W. 38; State v. Shields, 45 Conn. 256; Huber v. State, 126 Ind. 185; Kellogg v. State, 26 Ohio St. 15; Haley v. State, 49 Ark. 147; Ross v. People, 5 Hill 294; State v. Burgorf, 53 Mo. 65; Clark, p. 185; Bishop I., Sec. 258-259; Hawley & McGregor, p. 40; May 23, 241; Wharton, Sec. 556 *et seq.*

NOTE.—Consent is a good defence to acts not constituting a breach of the peace.

Regina v. Bradshaw, 14 Cox C. C. 83; State v. Beck, 1 Hill (S. C.) 363; Com. v. Parker, 9 Met. (Mass.) 263; State v. Cooper, 2 Zab. 52.

g.

Condonation.

The condoning of a criminal act affords no defence to prosecution.

Com. v. Slattery, 147 Mass. 423; State v. Tall, 24 S. W. 1010; Fluner v. State, 23 S. W. 1; Clark, p. 7, 276; May, 20; Hawley & McGregor, p. 6, note.

B.

KINDS.

Crimes are classified as Treasons, Felonies and Misdemeanors.

1. TREASON.

Treason is a breach of the allegiance owed by a subject to the Government. In the United States it consists in levying war against the United States, a State, or adhering to their enemies giving them aid and comfort.

UNITED STATES v. GREATHOUSE.

Circuit Court of the United States, 1863.

2 Abb. (U. S. C. C.) 364.

THE schooner Chapman was seized by the United States revenue officers, while sailing, or about to sail from the port of San Francisco, on a cruise in the service of the then so-called Confederate States, against the commerce of the United States; and the owner of the vessel and leaders of the expedition were indicted, under the act of Congress of July 17, 1862, for engaging in and giving aid and comfort to the then existing rebellion against the government of the United States.

FIELD, J., charged the jury as follows:—Gentlemen of the jury: Before proceeding to give any instructions in this case, it may be proper to briefly call attention to your appropriate and only province in the determination of the issues presented. There prevails a very general, but an erroneous opinion, that in all criminal cases the jury are the judges as well of the law as of the

fact—that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final—for new trials are not granted in criminal cases where a verdict has passed in favor of the defendant; but they have no right, legal or moral, to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law, rests solely with the court, and the responsibility of finding correctly the facts, rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect, is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. “I hold it,” says Mr. Justice Story, “the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the court as to the law. * * * This is the right of every citizen, and it is his only protection.”

You will, therefore, in this case, gentlemen, take the law from the court, and follow it. If the court err, the responsibility will not be shared by you.

The defendants are indicted for engaging in and giving aid and comfort to the existing rebellion against the government of the United States. The indictment is framed under section 2 of the act of Congress of July 17, 1862, entitled “An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;” and it charges the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the Constitution. Treason is the only crime defined by the Constitution. That instrument declares that “treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.” The clause was borrowed from an ancient English statute, enacted in the year 1352,

in the reign of Edward the Third, commonly known as the Statute of Treasons. Previous to the passage of that statute, there was great uncertainty as to what constituted treason. Numerous offences were raised to its grade by arbitrary constructions of the law. The statute was passed to remove this uncertainty, and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our Constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. "Treason against the United States," is the language adopted, "shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort." No other acts can be declared to constitute the offence. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

At the time the Constitution was framed, the language incorporated into it from the English statute had received judicial construction, and acquired a definite meaning; and that meaning has been generally adopted by the courts of the United States. Thus, Chief Justice Marshall, in commenting upon the term "levying war," says: "It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of the 25th of Edward III., from which it is borrowed."

The constitutional provision, as you perceive, is divided into two clauses—"levying war against the United States," and "adhering to their enemies, giving them aid and comfort." The

term "enemies," as used in the second clause, according to its settled meaning at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason. To convict the defendants, they must be brought within the first clause of the definition. They must be shown to have committed acts which amount to a levying of war against the United States. To constitute a levying of war, there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offence is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.

It is not, however, necessary that I should go into any close definition of the words "levying war," for it is not sought to apply them to any doubtful case. War has been levied against the United States. War of gigantic proportions is now waged against them, and the government is struggling with it for its life. War being levied, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, "however minute or however remote from the scene of action," are equally guilty of treason within the constitutional provision. In treason there are no accessories; all who engage in the rebellion, at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same footing—they are all principals in the commission of the crime; they are all levying war against the United States.

In *Exp. Bollman*, 4 Cranch, 127, Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country.

On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." And in commenting upon this language on the trial of Burr, the same distinguished judge said: "According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part: that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted." 2 Burr's Trial, 438-9.

The indictment in the present case, as I have already stated, is founded upon section 2 of the act of July 17, 1862. The Constitution, although defining treason, leaves to Congress the authority to prescribe its punishment. In 1790, Congress passed an act affixing to the offence the penalty of death. By section 1 of the act of July, 1862, Congress gave a discretionary power to the courts to inflict the penalty of death, or fine and imprisonment, providing that in either case the slaves of the party convicted, if any he have, shall be liberated. Section 2 of the act declares, "that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have, or by both said punishments, at the discretion of the court."

Section 4 provides that the act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person guilty of treason before its passage, unless convicted under the act.

There would seem upon a first examination to be an inconsistency between sections 1 and 2 of this act—section 1 declaring a particular punishment for treason, and section 2 declaring, for acts which may constitute treason, a different punishment. It appears from the debate in the Senate of the United States, when section 2 was under consideration, that it was the opinion of several senators that the commission of the acts which it designates might, under some circumstances, constitute an offence less than treason. The Constitution, as you have seen, declares that “treason against the United States shall consist only in levying war, or in adhering to their enemies, giving them aid and comfort.” Rebels not being enemies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective. But if such ruling had been made, it was made, we may presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities, and should have been indicted for levying war; for every species of aid and comfort, which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision—adhering to the enemies of the United States—would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause. Section 2 of the act, however, relieves the subject from any difficulty, so far as the form of the indictment is concerned. It is not necessary now to use specifically the term “levying war;” it will be sufficient if the indictment follows the language of the act, as the indictment does in the present case. But we are unable to conceive of any act designated in section 2 which would not constitute treason, except, perhaps, as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the Senate, and read the several sections of the act together, the apparent inconsistency disappears. Looking at the act alone, we conclude that Congress intended:—1st, to preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offences committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offences; 2nd, to punish treason thereafter committed with death,

or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States or the laws thereof, in which event the death penalty is to be abandoned, and a less penalty inflicted. By this construction the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.

The indictment charges, that on March 16, 1863, and long before and since, an open and public rebellion by certain citizens of the United States, under a pretended government, called the Confederate States of America, has existed against the United States and their authority and laws; that the defendants, in disregard of their allegiance to the United States, did on that day and divers other times before and since, at the city of San Francisco, "maliciously and traitorously" engage in, and give aid and comfort to, the said rebellion; that in the prosecution and execution of their "treasonable and traitorous" purposes, they procured, prepared, fitted out, and armed a schooner, called the J. M. Chapman, then lying within the port of San Francisco, with intent that the same should be employed in the service of the rebellion to cruise on the high seas, and commit hostilities upon the citizens, property, and vessels of the United States; and that they entered upon the said schooner and sailed from the port of San Francisco upon such cruise, in the service of said rebellion. In other words, the indictment alleges: 1st, the existence of a rebellion against the United States, their authority and laws; 2nd, that the defendants traitorously engaged in and gave aid and comfort to the same; 3rd, that in execution of their treasonable and traitorous purposes, they procured, fitted out, and armed a vessel to cruise in the service of the rebellion upon the high seas, and commit hostilities against the citizens, property, and vessels of the United States; and, 4th, that they sailed in their vessel from the port of San Francisco, upon such cruise, in the service of the rebellion.

The existence of the rebellion is a matter of public notoriety, and, like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged. The public notoriety, the proclamations of the president, and the acts of Congress, are sufficient proof of the allegation of the indictment in this respect. The same notoriety and public documents are also sufficient proof that the rebellion is organized and carried on under a pretended government, called the Confederate States of America.

As to the treasonable purposes of the defendants, there is no conflict in the evidence. It is true, the principal witnesses of the government are, according to their own statement, co-conspirators with the defendants and equally involved in guilt with them, if guilt there be in any of them. But their testimony, as you have seen, has been corroborated in many of its essential details. You are, however, the exclusive judges of its credibility. The court will only say to you that there is no rule of law which excludes the testimony of an accomplice, or prevents you from giving credence to it, when it has been corroborated in material particulars. Indeed, gentlemen, the court has not been able to perceive from the argument of counsel that the truth of the material portions of their testimony has been seriously controverted.

It is not necessary that I should state in detail the evidence produced. I do not propose to do so. It is sufficient to refer to its general purport. It is not denied, and it will not be denied, that the evidence tends to establish that Harpending obtained from the president of the so-called Confederate States a letter of marque—a commission to cruise in their service on the high seas, in a private armed vessel, and commit hostilities against the citizens, vessels, and property of the United States; that his co-defendants and others entered into a conspiracy with him to purchase and fit out and arm a vessel, and cruise under the said letter of marque, in the service of the rebellion; that in pursuance of the conspiracy they purchased the schooner *J. M. Chapman*; that they purchased cannon, shells, and ammunition, and the means usually required in enterprises of that kind, and placed them on board the vessel; that they employed men for the management of the vessel; and that, when everything was in readi-

ness, they started with the vessel from the wharf, with the intention to sail from the port of San Francisco on the arrival on board of the captain, who was momentarily expected. Gentlemen, I do not propose to say anything to you upon the much disputed questions, whether or not the vessel ever did, in fact, sail from the port of San Francisco, or whether, if she did sail, she started on the hostile expedition. In the judgment of the court they are immaterial, if you find the facts to be what I have said the evidence tends to establish.

When Harpending received the letter of marque, with the intention of using it, if such be the case (and it is stated by one of the witnesses that he represented that he went on horseback over the plains expressly to obtain it), he became leagued with the insurgents—the conspiracy between him and the chiefs of the rebellion was complete; it was a conspiracy to commit hostilities on the high seas against the United States, their authority and laws. If the other defendants united with him to carry out the hostile expedition, they too, became leagued with him and the insurgent chiefs in Virginia, in the general conspiracy. The subsequent purchasing of the vessel and the guns and the ammunition, and the employment of the men to manage the vessel, if these acts were done in furtherance of the common design, were overt acts of treason. Together, these acts complete the essential charge of the indictment. In doing them, the defendants were performing a part in aid of the great rebellion. They were giving it aid and comfort.

It is not essential, to constitute the giving of aid and comfort, that the enterprise commenced should be successful, and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels, and be itself captured, no assistance would, in truth, be rendered to the rebellion; but yet, in judgment of law—in legal intent—the aid and comfort would be given. So if a letter containing important intelligence for the insurgents, be forwarded, the aid and comfort are given, though the letter be intercepted on its way. Thus, Foster, in his Treatise on Crown Law, says: "And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a

traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Wherever overt acts have been committed which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities; it is a conclusion of law.

If the defendants obtained a letter of marque from the president of the so-called Confederate States, the fact does not exempt them from prosecution in the tribunals of the country for the acts charged in the indictment. The existence of civil war, and the application of the rules of war to particular cases, under special circumstances, do not imply the renunciation or waiver by the Federal government of any of its rights as sovereign toward the citizens of the seceded States.

As matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States taken in open hostilities as prisoners of war, and has thus exempted them from trial for violation of its municipal laws. But the courts have no such dispensing power; they can only enforce the laws as they find them upon the statute book. They cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the government in these particulars. By that department, the rules of war have been applied only in special cases; and notwithstanding the application, Congress has legislated, in numerous instances, for the punishment of all parties engaged in, or rendering assistance in any way to the existing rebellion. The law under which the defendants are indicted, was passed after captives in war had been treated and exchanged as prisoners of war, in numerous instances.

But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of States which have

never seceded, and secretly getting up hostile expeditions against our government and its authority and laws. The local and temporary allegiance, which every one—citizen or alien—owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.

These, gentlemen, constitute all the instructions I have to give. My associate, Judge Hoffman, will submit some further observations to you. The case is one of much interest—not because it is the only case for treason tried in the State, but because of the great importance of the principles involved. As you will weigh carefully the evidence, and be guided by the instructions of the court, you will have no difficulty in reaching an intelligent and just verdict.

HOFFMAN, J., then gave additional instructions to the jury, substantially consistent with those above stated.

The jury found a verdict of guilty.

U. S. *v.* Hoxie, 1 Paine 265; U. S. *v.* McCarty, 2 Dall. 86; U. S. *v.* Mitchell, 2 Dall. 348; *Respublica v. Roberts*, 1 Dall. 39; U. S. *v.* Hanway, 2 Wall. Jr. 139; Const. U. S., Art. 3, Sec. 3, Cl. 1; Minn. Stat. 1894, Sec. 6318; N. Y. Penal Code, Sec. 37-40; Clark, p. 32, 351; Bishop I., Sec. 611-613; Hawley & McGregor, p. 115; May, Sec. 124; Wharton, Sec. 1782 *et seq.*; The Penal Code of Pa.; Shields, vol. I., 183 to 186; vol. II., 640, 663, 669.

NOTE.—Petit treason, an offence unknown to-day, was at common law the killing of a superior by an inferior.

Bishop Cr. Law, Sec. 611; *Bilansky v. State*, 3 Minn. 427; N. Y. Penal Code, Sec. 182; Clark, p. 32; May, Sec. 134; Bishop I., Sec. 611; Hawley & McGregor, p. 115.

2. FELONY.

By the common law a felony was a crime, the punishment for which was forfeiture of the estate, and in some cases death. By the statutory law it is any crime the punishment for which may be death or imprisonment in the state's prison.

BENTON *v.* COMMONWEALTH.

Supreme Court of Appeals of Virginia, 1893.

89 Va. 570; 16 S. E. 725.

LEWIS, P., delivered the opinion of the court.

The plaintiff in error, D. W. Benton, was jointly indicted with Herbert Wilson and John Benton for house-breaking. The indictment charges a breaking and entering, in the night-time, with intent to commit larceny, and the actual larceny of a quantity of meat, of the value of fifty dollars.

Upon this indictment Wilson was separately tried and convicted, the verdict being in these words: "We, the jury, find the prisoner, Herbert Wilson, guilty as indicted, and fix the penalty at twelve months in the county jail, and a fine of five dollars;" and there was judgment accordingly. By section 3706 of the Code the offence charged in this indictment is punishable by imprisonment in the penitentiary not less than two nor more than ten years, or, in the discretion of the jury, by imprisonment in jail not exceeding twelve months and a fine not exceeding five hundred dollars.

On the trial of the present case, after the conviction of Wilson, the commonwealth offered the latter as a witness to prove that the plaintiff in error and the witness were of a party of four persons who committed the offence mentioned in the indictment. The prisoner objected to the competency of the witness, on the ground that he had been convicted of a felony, for which he had not been pardoned or punished. But the objection was over-

ruled, and the witness was allowed to testify; to which ruling the prisoner excepted.

The statute provides that, "except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor." Code, Sec. 3898.

It is conceded that at the time of the trial the witness, Wilson, had not been pardoned or punished for the offence of which he had been convicted; and the question is, Was that offence a felony, although the punishment ascertained by the jury was only imprisonment in jail and a fine of five dollars? We are of opinion that it was.

In Virginia offences are either felonies or misdemeanors. "Such offences as are punishable with death or confinement in the penitentiary are felonies; all other offences are misdemeanors." Code, Sec. 3879. The question in the present case, therefore, depends upon the meaning and effect of the word "punishable" in this section.

The crime of house-breaking, with intent to commit larceny, is a felony; and it is equally certain that it would have been competent for the jury, under the indictment in the present case, to have found the accused, Wilson, guilty of larceny. But they have not done so. The verdict rendered was a general verdict of "guilty as indicted," and this, according to *Vaughan's Case*, 17 Gratt. 576, was a conviction, not of larceny, but of house-breaking with intent to steal; so that there is no room for the argument of the attorney-general that the verdict must be construed as a conviction for a misdemeanor, under section 4040 of the Code, which provides that "if a person indicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor."

The word "punishable" in section 3879 evidently refers to offences which may be punished by confinement in the penitentiary, and not to those only which must be so punished. The legislature never intended to leave the grade of any offence to the discretion of a jury, and we need only look to section 3903 of the Code to find that there are felonies which may be pun-

ished in a milder manner than by confinement in the penitentiary; for by that section it is provided that "the term of confinement in the penitentiary, or in jail, of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, so far as the term of confinement and the amount of the fine are not fixed by law."

As long ago as *Barker's Case*, 2 Va. Cas. 122, it was decided that every offence punishable by confinement in the penitentiary is a felony, unless it be by statute denominated a misdemeanor; and there are numerous decisions outside of Virginia to the same effect.

House-breaking with intent to commit larceny, then, is a felony, and its nature is not affected when, in a particular case, the jury, in the exercise of a discretion, fix a lighter punishment than confinement in the penitentiary. It is a crime, in the estimation of the legislature, of a deeper dye than ordinary misdemeanors, and is nowhere declared by statute to be a misdemeanor under any circumstances.

Upon this subject a philosophical writer, after observing that in a considerable number of the States of the Union, there are statutes defining felony to be an offence punishable either by death or by imprisonment in the State prison, says further: "If, by the terms of the statute, the court or jury is at liberty to inflict some milder punishment, instead of imprisonment or death, this discretion does not prevent the offence from being felony. That the heavier punishment may be imposed is sufficient." 1 Bish. Crim. Law (7th ed.), Sec. 619.

One of the earliest cases on the subject is *Johnston v. State*, 7 Mo. 183. In that case the defendant was indicted for a felonious assault. The jury found him guilty, and assessed as his punishment a fine and imprisonment in jail. The error assigned was that the indictment was for a felony, and the judgment for a misdemeanor. But the court said: "This is a mistake, originating in a misunderstanding of the definition of the word 'felony' by our statute. A felony under our act is an offence for which the party may be imprisoned in the penitentiary. The legislature have wisely left it to the discretion of the jury, in many offences, to inflict the punishment of imprisonment in the penitentiary, or fine

and imprisonment in a county jail; and the offence charged in this indictment is one of them. Though this discretion is given to the juries, they are still felonies."

To the same effect is *State v. Smith*, 32 Me. 369, in which case it was contended, under a statute similiar to ours, that an offence, to be a felony, must be punishable in the State prison; but the court held that any offence was a felony which was liable to be so punished, although it might also be punished by fine or imprisonment in jail. And this ruling was reaffirmed in *State v. Mayberry*, 48 Me. 218, 236.

In a recent case in Arkansas the defendant was indicted for slander, which, under a statute of that State, is punishable by imprisonment in the penitentiary, or, in the discretion of the court, by fine. Another statute of the same State classifies and defines offences as ours does; and it was held that slander, in that State, was a felony, because it might be punished by imprisonment in the penitentiary, and that the discretion vested in the court to mitigate the punishment did not alter the nature of the crime. "The same acts," said the court, "cannot at the same time constitute a felony and a misdemeanor. They cannot co-exist as the result of one and the same transaction. The crime must be one or the other, not both, or either." *State v. Waller*, 43 Ark. 381.

Another case in point is *People v. War*, 20 Cal. 117. In that case it was held that although the offence charged in the indictment might, in the discretion of the court, be punished by fine only, yet, inasmuch as it was also punishable—which meant, it was said, liable to be punished—by imprisonment in the State prison, it was a felony, under a statute of California declaring all offences "punishable by death or imprisonment in a State prison" to be felonies.

The same principle was recognized in *Canada's Case*, 22 Gratt. 899, which was an indictment for a felonious and malicious assault, with intent to maim, disfigure, disable, and kill. In delivering the opinion of the court, Moncure, P., said it was competent for the jury to acquit the accused of maliciously doing the act charged against him, and to convict him of unlawfully doing it; and that both of these offences were felonies, although the latter is punishable by confinement in the penitentiary, or, in the discretion of the jury, by confinement in jail and a fine. The

idea evidently was that the grade of the offence is fixed by the statute, and is not dependent upon the character of the punishment which may happen to be imposed in any particular case. It was also held that it was competent for the jury to convict the accused, as they did, of a simple assault and battery, because that offence was substantially charged in the indictment.

In a recent and valuable work, in which many of the cases on the point are cited, it is laid down that a felony in this country is a crime punishable with death or imprisonment in the State prison, or for the commission of which the perpetrator may be so punished; and that a discretion to assess a lighter punishment does not reduce the grade of the crime. 4 Am. & Eng. Ency. of Law, p. 651.

It is clear, therefore, that Wilson was an incompetent witness in the present case, and that the trial court erred in admitting him to testify. And the same remark applies to the witness, Barton, mentioned in the bill of exceptions.

The case must, therefore, be sent back for a new trial.

Judgment reversed.

People v. Hughes, 137 N. Y. 29; People v. Lyon, 99 N. Y. 210; People v. Park, 41 N. Y. 21; People v. War, 20 Cal. 117; Ingram v. State, 7 Mo. 293; Johnston v. State, 7 Mo. 183; People v. Van Steenburg, 1 Park Cr. 39; Weinjorpfm v. State, 7 Blackf. 186; Fassett v. Smith, 23 N. Y. 252; Minn. Stat. 1894, Sec. 6289; N. Y. Penal Code, Sec. 4 & 5; Clark, p. 33; Bishop L., Sec. 615; Wharton, Sec. 22; May, Sec. 10; Hawley & McGregor, p. 97.

3. MISDEMEANOR.

All crimes not treasons or felonies are misdemeanors.

PEOPLE v. WAR.

Supreme Court of California, 1862.

20 Cal. 117.

NORTON, J. delivered the opinion of the court—Field, C. J. concurring.

The indictment in this case is for the crime of "an assault with a deadly weapon, with intent to inflict upon the person of another

a bodily injury, there appearing no considerable provocation therefor." A demurrer to the indictment was sustained, and the people have appealed.

The indictment is proper in form. The offence could not be stated in any other mode that would better comply with the rules of criminal pleading or the requirements of the act to regulate proceedings in criminal cases. Section two hundred and thirty-seven of that Act requires the acts constituting the offence to be stated. According to the form given in section two hundred and thirty-eight, it is proper to precede the statement of the acts constituting the offence by a statement of the crime of which the party is indicted, "giving its legal appellation, such as murder, arson, manslaughter, or the like, as designating it as felony or misdemeanor." This does not require that it shall be called a felony or a misdemeanor, but it assumes that the legal appellation of the crime will itself show whether it is a felony or a misdemeanor. If the legal appellation of the crime as given in the statute defining the offence does not show whether it is a felony or a misdemeanor, it cannot be made or shown to be one or the other by the pleader calling it a felony or a misdemeanor. In this indictment the legal appellation, that is, the designation of the crime as given in section fifty of the Act concerning Crimes and Punishments, which creates the offence, is properly set forth.

The real objection to this indictment, if there be any, is that the facts set forth do not constitute a public offence, because the punishment prescribed being either imprisonment in the State prison or a fine, it does not appear whether it is a felony or a misdemeanor, and hence it does not necessarily fall within any class of crimes known to the law. The discretion given as to the punishment certainly does not make the same act two offences, and it would be a singular consequence if the fixing alternative punishments belonging to different classes of crimes should prevent a criminal act from being indictable as any crime. We think, however, there is no uncertainty as to the grade of the crime charged. "A felony is a public offence, punishable by death or by imprisonment in a State prison. Every other public offence is a misdemeanor." (Act to regulate proceedings in criminal cases, Secs. 4, 5.) Under these definitions, any offence which may be or is liable to be punished by death or imprisonment in

the State prison is a felony. Any offence which is not liable to such punishment—that is, for which that grade of punishment cannot under any circumstances be inflicted—is a misdemeanor. Although the offence charged in this indictment may, in the discretion of the court in any particular case, be only punished by a fine, yet the offence is one which is punishable, which is liable to be punished, by imprisonment in the State prison, and hence it must be prosecuted with the forms and solemnities of a crime of the grade of a felony.

The case being one of felony, it follows that this court has jurisdiction of the appeal.

The case of *The People v. Cornell* (16 Cal. 187) decides that a judgment, in a case like this, which has limited the punishment to a fine, cannot be appealed to this court as not being a case of felony. But that was upon the ground that a judgment appealed from was a judgment for a misdemeanor, and that the nature and extent of the punishment fixed the right of appeal. The consequences of the judgment from which the appeal was taken were not of that gravity which the Legislature had deemed requisite to authorize an appeal to this court. In the present case, no judgment has been pronounced which protects the defendant from liability to be punished by imprisonment in the State prison. As the point ruled in that case is not the same as the one presented in this, it is not necessary to decide whether the reasons assigned in the two cases are strictly reconcilable.

Judgment reversed, and the court below directed to give judgment for the plaintiff on the demurrer, with leave to the defendant to plead to the indictment.

Com. v. Newell, 7 Mass. 245; *Com. v. Barlow*, 4 Mas. 439; *McGinnis v. State*, 9 Humph. 43, 50; *Buford v. Com.*, 14 B. Mon. 24; *State v. Smith*, 8 Blackf. 489; *Thorp v. Com.*, 3 Metc. (Ky.) 411; Minn. Stat. 1894, Sec. 6290; N. Y. Penal Code, Sec. 4, 6, 15; Clark, p. 33; Bishop I., Sec. 623; Wharton, Sec. 23; May, Sec. 11; Hawley & McGregor, p. 97; The Penal Code of Pa.; Shields, vol. I., 233, 263, 267, 293, 296, 484, 489.

C.

HOW PRESCRIBED.

1. BY THE COMMON LAW.

Criminal law is both written and unwritten.

The unwritten criminal law is prescribed by the common law. It consists of those acts recognized as criminal and punished by common consent and immemorial usage. It is the criminal law of the States except so far as it has been changed and in some cases supplanted by statute.

COMMONWEALTH v. McHALE.

Supreme Court of Pennsylvania, 1881.

97 Pa. St. 397.

DEFENDANTS were indicted for conspiring to secure fraudulent election returns.

PAXSON, J. The court below quashed the indictment in each of the above cases, upon the ground that the offences charged were barred by the Statute of Limitations. If, as was assumed by the learned judge, the indictments are under the Act of July 2d, 1839, and its supplements, and the limitation of one year contained in said act is not enlarged by the 77th section of the Criminal Procedure Act of 31st March, 1860, his conclusion is not inaccurate. A careful comparison of the several indictments with the act of 1839 and its supplements leads us to the conclusion that they are not laid under it, and hence do not come within its limitation. One of them, *Com. v. John J. Kelly*, No. 300, Jan. T. 1880, may have been intended to come within the

provisions of section 106 of said act, but the indictment does not charge the precise offence defined in said section, although it does one of a similar nature. Nor are we able to find any other act of Assembly which will sustain these indictments. If, however, the acts charged are offences at common law they would not come within the limitation claimed for the act of 1839. The 178th section of the Crimes Act of 31st March, 1860, Pamph. L. 425, provides that "every felony, misdemeanor or offence whatever, not specially provided for in this act, may and shall be punished as heretofore." This is a saving section, leaving every crime not specially provided for in this act punishable as heretofore: Report on Penal Code 37. Under it an indictment will lie against a woman as a common scold: *Com. v. Mohn*, 2 P. F. Smith, 243.

The indictment against Anthony McHale contains three counts. In the first count it is charged that "intending to procure a false count and return of the votes cast by the electors," etc., he did "make false and fraudulent entries in the books kept by the clerks at said election in said election district, which books are commonly known as the list of voters, of the names of divers persons, to wit, twenty-one persons whose names are as follows," etc. The second count charges that, with like intent, he did "deposit among the ballots cast at said election in said election district by the electors voting thereat, false and fraudulent ballots of a largenumber, to wit, twenty-one ballots," etc. The third count charges that with like intent he did, "with the connivance of the election officers holding said election, undertake and assume to count the ballots cast by the electors voting at said election in said election district and did falsely, fraudulently, maliciously and unlawfully make a false and fraudulent count of said ballots as to make it appear that two hundred and eleven votes were deposited for one Adolph W. Schalek for the office of district attorney, when in truth and in fact he did not receive more than one hundred and eighty-five votes," etc.

The indictment against James T. Kelley charges that with a similar intent to procure a false count, he did "deposit among the ballots cast at said election, in said election district, by the electors voting thereat, false and fraudulent ballots of a large number, to wit: twenty-one ballots," etc.

The indictment against John J. Kelly charges substantially the same offence as is set out in the first count of the indictment against McHale.

Some of these offences, perhaps all of them, are indictable under the act of 1839, and its supplements, when committed by election officers. The defendants were not election officers; at least, they were not indicted as such.

It must be conceded that offences which strike at the purity and fairness of elections are of a grave character. Are they indictable at the common law? This is a serious and at the same time comparatively new question. In considering it, we have little in the way of authority to guide us.

It was assumed by the learned counsel for the defendants that an indictment will not lie at common law for such acts. In their printed argument they dismiss the subject with this brief remark: "Offences against the election laws are unknown to the common law; they are purely and exclusively of statutory origin." It may safely be admitted that if the question depends upon the fact whether a precise definition of this offence can be found in the text books, or perhaps in the adjudged English cases, the law is with the defendants. This, however, would be a narrow view, and we must look beyond the cases and examine the principles upon which common-law offences rest. It is not so much a question whether such offences have been so punished as whether they might have been.

What is a common-law offence?

The highest authority upon this point is Blackstone. In chap. 13, of vol. 4, of Sharswood's edition, it is thus defined: "The last species of offences which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding series. These amount some of

them to felony, and others to misdemeanors only." The learned author then proceeds to define certain offences of both classes which are among the crimes against the public police or economy. The felonies I will omit. The misdemeanors are: 1. Common or public nuisances, of which a large variety are given, commencing with obstructions to public highways and ending with common scolds. 2. Idleness. 3. Sumptuary laws. 4. Gaming. 5. Destroying game. These, as the text shows, are but illustrations. A large number of these and other common-law offences are now, and have for many years been regulated by statute in England. But in those instances the statute is merely declaratory of the common law, the object being to define the crime with greater accuracy or to increase the punishment.

The above quotation from Blackstone is in harmony with other text writers. Bishop in his work on Criminal Law, vol. i., Secs. 358 and 368 (1st ed.) says: "The government requires its subjects to do more than simply abstain from attempting its overthrow. It requires them to give, when called upon, their active assistance to it, and at all times to refrain from casting obstructions in the way of its several departments and functions. Therefore every violation of these duties, being sufficient in magnitude for the law to regard, is criminal. * * * We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law." Mr. Wharton in his work on Criminal Law, vol. i. Sec. 6 (6th ed.), places the giving of more than one vote at an election as among the misdemeanors at common law. The Supreme Judicial Court of Massachusetts in two cases has recognized the same doctrine. The first was *Commonwealth v. Silsbee*, 9 Mass. 417, which was an indictment charging that the defendant did "willfully, fraudulently, knowingly and designedly give in more than one vote for the choice of selectmen of the said town of Salem at one time of balloting," etc. After conviction the defendant moved in arrest of judgment that there was no statute covering the offence. It was said by the court: "There cannot be a doubt

that the offence described in the indictment is a misdemeanor at common law. It is a general principle that where a statute gives a privilege, and one willfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of other voters, and for this offence the common law gives the indictment." The other case is *Commonwealth v. Hoxey*, 16 Mass. 385. The defendant was charged with disturbing a town meeting assembled to make choice of town officers for the political year then ensuing, and that the said defendant, "intending as much as in him lay to prevent the choice of said selectmen according to the will of the electors and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectmen should not be chosen, and attempted repeatedly to take from the box, which contained the ballots of the electors, the votes of the electors," etc. The defendant pleaded guilty to the indictment, and moved in arrest of judgment; "because the said indictment purports to be founded upon a statute law of the Commonwealth; whereas there is no such statute in the State making the facts set forth in the indictment an offence against the Commonwealth; and because the facts set forth in the indictment do not amount to an offence at common law." The court, after admitting there was no statute to meet the case, proceeded to say: "The remaining question is, do the facts charged amount to an offence at common law? On this question we entertain no doubts. Here was a violent and rude disturbance of the citizens, lawfully assembled in town meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and to the prevention of elections necessary to the orderly government of the town, and due management of its concerns for the year. It is true that the common law knows nothing perfectly agreeing with our municipal assemblies. But other meetings are well known and often held in England, the disturbance of which is punishable at common law as a misdemeanor. In this Commonwealth town meetings are recognized in our Constitution and laws; and the elections made and business transacted by the citizens at those meetings lie at the founda-

tion of our whole civil polity. If then there were no statute prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported." While the court put this case partly upon the ground that the defendant's conduct tended to a breach of the peace, it is evident the principal reason was the interference with the rights of the electors, which as the learned judge truly said "lie at the foundation of our civil polity," and it may be safely asserted that every fraud upon the ballot tends directly to a breach of the public peace if not to revolution and civil war.

We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy.

It needs no argument to show that the acts charged in these indictments are of this character. They are not only offences which affect public society, but they affect it in the gravest manner. An offence against the freedom and purity of elections is a crime against the nation. It strikes at the foundations of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. When this confidence is once destroyed the end of popular government is not distant. Surely, if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, an offence which involves the right of a free people to choose their own rulers in the manner pointed out by law is not beneath the dignity of the common law, nor beneath its power to punish. The one is an annoyance to a small portion of the body politic; the other shakes the social fabric to its foundations.

We are of opinion that the offences charged in these indictments are crimes at common law. We regard the principle thus announced as not only sound but salutary. The ingenuity of politicians is such that offences against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them.

It follows from what has been said that it was error to quash the indictments.

The judgment is reversed in each case, and a *procedendo* awarded.

Com. v. Chapman, 13 Metc. (Mass.) 68; Com. v. Harrington, 3 Pick. 26; Brockway v. People, 2 Hill 558; Walsch v. People, 65 Ill. 58; Com. v. Silsbee, 9 Mass. 417; State v. Rollins, 8 N. H. 550; Kilpatrick v. People, 5 Denio 277; Henderson v. Com., 8 Gratt. 708; Brooks v. State, 2 Yerg. 482; State v. Huntly, 3 Ired. 418; Territory v. Ye Wan, 2 Mont. 478; Clark, p. 15; May, Sec. 2; Bishop I., Sec. 30 *et seq.*; Wharton, Sec. 15 a.; Hawley & McGregor, p. 3.

2. BY STATUTE.

In some States no act is a crime unless made so by statute. In such States the entire criminal law is prescribed by the penal code of each respective State.

MARVIN v. STATE.

Supreme Court of Judicature of Indiana, 1862.

19 Ind. 181.

PERKINS, J. Jesse Marvin was prosecuted in the Fountain Common Pleas, for disturbing a religious meeting by responding to the preacher. He was convicted and fined.

We have a statute which enacts, that if any person shall keep a place for the sale of any article; or shall sell any article; or shall keep any gaming apparatus; or shall permit his real property to be occupied for any of the aforementioned purposes, or with the aforementioned apparatus, within a mile of any meeting, assembled for, etc., or shall disturb any such meeting, or any member thereof, either at the meeting, or while going to or returning from the same, etc., shall be fined not less than five nor more than twenty-five dollars. 2 G. & H., p. 469.

The defendant in this case, as appears, was not prosecuted for any one of the acts specified in the statute as constituting a crime, as entering into its definitions, but under the general clause, for disturbing a religious meeting; a clause which defines nothing,

but enacts a vague conclusion, an abstract, general proposition, of infinitely uncertain application. And the question is: Can the conviction, upon that branch of the statute, be sustained?

Before proceeding to answer this question, we may, with propriety, look a moment or two at some heretofore, in this country, generally conceded views and propositions:

1. There are two general modes of government, viz., by rule, or established laws, and without rule, without regard to law, that is, by magisterial discretion.

In theory, a political organization, governed by magisterial discretion, is an unmitigated despotism; and, according to history, it has generally turned out to be so in practice. In past years, the Sultan of Turkey, the Autocrat of Russia, and some of the kings and emperors of ancient Rome, governed by magisterial discretion. The Tudors and Stuarts of England attempted the same kind of government. Government by such discretion, is the government of a master over a slave.

2. The devising of proper and efficient checks upon governmental discretion, whereby lawless outrage upon the citizen may be prevented, is one of the greatest achievements in political science. Among the checks already devised for such purpose, are the division of a single government into departments, and the framing, with precision and certainty of expression and definition, of written constitutions and laws, declaring the rights, duties, and liabilities of all, and controlling the action, and limiting the powers, alike of the governors and the governed.

3. Magisterial discretion, in declaring and punishing crimes, is, perhaps, more liable to abuse, and to be made the instrument of tyranny and oppression, than it is in any other branch of administration. Hence the necessity of the most efficient checks, and their most scrupulous observance in this branch. Influenced, we may presume, by these considerations, it has been made established law, that there are no common law crimes in this State; that, in Indiana, "Crimes and misdemeanors shall be defined, and punishment therefor fixed by the statutes of this State, and not otherwise." 1 G. & H., p. 416, and notes.

This may be an injudicious application of the doctrine of limiting discretion; it may be carrying it to extreme. It not only cuts off magisterial, executive discretion in declaring crimes, which

is certainly right, but, also judicial, which may be wrong, and is surely inconvenient, when applied to every possible case. The legislature can scarcely foresee every state of facts, can scarcely anticipate every possible act, and, hence, can scarcely prescribe specially for every individual case; while, on the other hand, the judiciary acts generally upon individual cases as they occur, and is thus enabled, by a careful and wise discrimination, to gradually build up a criminal code, within limits prescribed by the legislature, more just and certain in character than might otherwise be obtained. At the same time, it must be accomplished through the judiciary, by open, speedy public trials, with the aid of counsel and jury, whereby tyranny and abuse will be pretty effectually checked.

It might be better to leave the power in the courts of defining, upon given states of fact, or going to the common law for definitions, in cases of necessity, as was formerly the practice in this State. See 1 Kent Com., Lecture 16. But we have not to decide upon what the law might be, but what it is. It is, that the legislature alone can define a crime in Indiana. No crime, then, can be punished, in Indiana, by her own courts, till it has been defined. No power can define a crime but the legislative; hence, the court can not do it here, as it can in England, in case of misdemeanors. The question in this case is, then: Has the legislature defined the crime of disturbing a meeting? If so, what is the definition? Where is it to be found? What must a person do to, in legal meaning, disturb a meeting, or a member thereof? Will a look disturb? Will a smile? Will a word spoken? Will a posture, or style of dress disturb? If so, what? Who can give an exact answer? And, is intention with which an act is done to be material? Naming a crime is not defining it; but a definition is an enumeration of the particular acts included by or under the name.

That part of the section of the statute, then, which simply declares that it is a crime to disturb a meeting, only names, without defining, a crime; and the court can not define it without exercising magisterial discretion; and judge-made law, in this case, would, perhaps, be the law of a tyrant. See *Spencer v. The State*, 5 Ind., p. 46.

The decision we here make but follows those in *Hackney v.*

The State, 8 Ind. 494, and *Jennings v. The State*, and *The State v. Huey*, 16 Id., pp. 335, 338.

Per Curiam.—The judgment is reversed. Cause remanded to be dismissed.

Com. v. Waite, 11 Allen 264; *Hackney v. State*, 8 Ind. 494; *Mitchell v. State*, 42 Ohio St. 383; *Smith v. State*, 12 Ohio St. 466; *Jones v. State*, 59 Ind. 229; Minn. Stat. 1894, Sec. 6286; N. Y. Penal Code, Sec. 2; *Clark*, p. 22; *May*, Sec. 3; *Hawley & McGregor*, p. 4, note.

NOTE.—In some States having a criminal code, it is held that the common law is not abrogated; that the code only supplants it where it is inconsistent, and that the general effect of the code is to enlarge and make more specific the field of criminal liability.

Pitcher v. People, 16 Mich. 142; *State v. Pulle*, 12 Minn. 164; *State v. Danforth*, 3 Conn. 112; *State v. Gaunt*, 13 Cr. 115; *Clark*, p. 30; *May*, Sec. 3.

NOTE.—The United States courts do not recognize common law crimes. They have no general criminal jurisdiction. They receive no such jurisdiction either explicitly or impliedly under the constitution.

U. S. v. Walsh, 5 Dillon 58; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Hudson*, 7 Cranch 32; *U. S. v. Worrall*, 2 Dallas 384; *U. S. v. Wiltberger*, 5 Wheaton 76; *U. S. v. Reese*, 92 U. S. 216; *Penn. v. Bridge Co.*, 13 How. 519; *U. S. v. Clark*, 1 Gall. 497; *U. S. v. Wilson*, 3 Bl. C. C. 435; *U. S. v. Barney*, 5 Bl. 294; *U. S. v. Ramsey*, Hempst. 481; *In re Bergen*, 2 Hughes 516; *U. S. v. Hare*, 2 Wheeler C. C. 300.

Contra.—*U. S. v. McGill*, 4 Dall. 429; *U. S. v. Smith*, 6 Dean Abr. 718; *U. S. v. Henfield*, Whart. St. Trials 85; *May*, Sec. 4; *Wharton*, Sec. 253; *Clark*, p. 22; *Bishop*, p. 22; *Bishop I.*, Sec. 98; *Hawley & McGregor*, p. 53.

D.

JURISDICTION.

An offence against the laws of one sovereign is no offence against the laws of another; and one sovereign has no jurisdiction over crimes committed in the territory of another. Hence it is important to determine the territorial limits of each sovereign.

1. LOCALITY.

A crime's locality is determined by the place where the public was injured, which is the place where the force took effect.

STATE v. HALL.

Supreme Court of North Carolina, 1894.

114 N. C. 909; 19 S. E. 602.

PROSECUTION against William Hall and John Dockery for murder. From a judgment of conviction defendants appeal.

SHEPHERD, C. J. There was testimony tending to show that the deceased was wounded and died in the State of Tennessee, and that the fatal wounds were inflicted by the prisoners by shooting at the deceased while they were standing within the boundaries of the State of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offence within the jurisdiction of this State.

It is a general principle of universal acceptance that one State

or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offences committed in and against another State or sovereignty. Rorer's Inter-State Law, 308; Story's Conflict Laws, 620-623; The Antelope, 10 Wheaton, 66-123; State v. Knight, Taylor's Rep., 65; State v. Brown, 1 Haywood, 100; State v. Cutshall, 110 N. C., 538.

There may, by reason of "a statute or the nature of a particular case," be apparent exceptions to the rule, as if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it; or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretences; or does any other crime in our own locality against our laws, he is punishable, though absent, the same as if he were present." 1 Bishop Cr. Law, 109-110; State v. Cutshall, *supra*.

These cases, however, are but instances of crimes which are considered by the law to have been committed within our territory, and in nowise conflict with the general principle to which we have referred. Starting, then, with this fundamental principle and avoiding a general discussion of the subject of extra-territorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination.

It seems to have been a matter of doubt in ancient times whether, if a blow were struck in one county and death ensued in another, the offender could be prosecuted in either, though according to Lord Hale (Pleas of the Crown, 426) "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck, and the jury might there," he adds, "inquire both of the stroke and death." 1 Starkie Cr. Pl., 2 Ed., 304; 1 Hawks, Pl. of Crown, ch. 13; 1 East, 361. But to remove all doubt in respect to a matter of such grave importance, it was enacted by the statute 2 and 3 Edward VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law

or by re-enactment, is in force in many of the States of the Union, and as applicable to counties within the same State its validity has never been questioned (see Acts 1891, ch. 68, and also The Code of Tennessee, Sec. 5801), but where its provisions have been extended so as to affect the jurisdiction of the different States its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not indeed uniformly, sustained. *Simpson v. State*, 4 Hump. (Tenn.), 461; *Green v. State*, 66 Ala., 40; *Commonwealth v. Macloon*, 101 Mass., 1; *Tyler v. People*, 8 Mich., 326; *Hemmaker v. State*, 12 Mo., 453; *People v. Burke*, 11 Wend., 129; *Hunter v. State*, 40 N. J., 495.

Statutes of this character "are founded upon the general power of the Legislature, except so far as restrained by the Constitution of the Commonwealth and the United States, to declare any willful or negligent act, which causes an injury to person or property within its territory, to be a crime." Kerr on Homicide, 47. See, also, remarks of Justice Bradley in the *habeas corpus* proceedings of Guiteau, reported in the notes to the case of *United States v. Guiteau*, 47 Am. Rep., 247; 1 Mackey, 498. In many of the States there are also statutes substantially providing that where the death occurs outside of one State, by reason of a stroke given in another, the latter State may have jurisdiction. See our act, The Code, Sec. 1197. The validity of these statutes seems to be undisputed, and, indeed, it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the Supreme Court of the District of Columbia in Guiteau's case, *supra*, in which the authorities are collected and their principle stated with much force by Justice James. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions, and it is equally clear that where the stroke and the death occur in the same State the offence of murder at common law is there complete, and the courts of that State can alone try the offender for that specific common law crime.

The turning point, therefore, in this case is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of death; and upon this question the authorities all seem to point in one direction.

In the early case of *Rex v. Coombs*, 1 Leach Crown Cases, 388, it was held that "if a loaded pistol be fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the Admiralty Jurisdiction; for the offence is committed where the death happened and not at the place whence the cause of the death proceeds." See also, 1 East, 367, and 1 Chitty Cr. Law, 154.

In the case of *United States v. Davis*, 2 Sumner, 482, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed—Mr. Justice Story, in the course of his opinion, said: "What we found ourselves upon in this case is that the offence, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect and the death happened on board of the schooner, and the act was, in contemplation of law, done where the shot took effect. * * *

We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen."

In *Simpson v. State*, 17 S. E. Rep., 984, it was held by the Supreme Court of Georgia that one who, in the State of South Carolina, aims and fires a pistol at another who at the time is in the State of Georgia, is guilty of the offence of "shooting at another" although the ball did not take effect, but struck the water in the latter State. The court said: "Of course the presence of the accused within this State is essential to make his act one which is done in this State, but the presence need not be actual; it may be constructive. The well-established theory of the law is that where one puts in force an agency for the com-

mission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual. * * * So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia the law regards him as accompanying the ball and as being represented by it up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this State the mere fact of missing would not render the person who shot any the less guilty; consequently, if one shooting from another State goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle."

The court approved of the language of Campbell, J., in *Tyler v. People*, 8 Mich., 320, that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative."

In speaking of crime committed by one out of the State, through an innocent agent, Judge Rorer says: "In such case the innocent person in the State is the means used to perpetrate the crime therein, just as if a person who shoots out of a State across the line into another State and therein intentionally kills another person is in such case guilty of committing the criminal act within the State without himself being at the time therein." *Interstate Law*, 326.

In *Commonwealth v. Macloon*, *supra*, Justice Gray says that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction."

In *State v. Carter*, 3 Dutcher, 499, the Supreme Court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and shooting across the border kills one in New Jersey. When that is so the blow is in fact struck in New Jersey. It is the defendant's act in this State. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the

defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the State as where he stands in it."

In *State v. Chapin*, 17 Ark., 560, the court said: "For example, if a man standing beyond our boundary line, in Texas, were, by firing a gun or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect." See also, *People v. Adams*, 3 Denio, 207.

In *Stillman v. Manufacturing Co.*, 3 Woodb. & M. (U. S.), 538, Woodbury, J., said: "I can conceive of crimes, likewise, like civil injuries, which may be prosecuted in two States, though sometimes in different forms as here. * * * So, if one fires a gun in one State, which kills an individual in another State, there may be the offence of using a deadly weapon in the first State (that is, we suppose, by statute) and committing murder by killing in the second State."

In speaking of the validity of acts similar to that of Edward VI., *supra*, Mr. Black, in an article in the "Central Law Journal" (Vol. XXXVIII, p. 318), remarks: "There is less difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory. For, of course, the act can amount to nothing more than an attempt, until the fatal agency comes in contact with the body of the victim." See, also, upon this subject "American Law Review," Vol. XX, p. 918.

In view of the foregoing authorities it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee, and it is also clear that the offence of murder at common law was committed within the jurisdiction of that State. If this be so it must follow that unless we have some statute expressly conferring jurisdiction upon the courts of this State, or making the act of shooting under the circumstances a substantive murder, the offence with which the prisoners are charged can only be tried by the tribunals of Tennessee.

It is true that in Wharton's Criminal Law, 288, it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offence," but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one State to take effect in another (*U. S. v. Worrall*, 2 Dall., 383), or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (*Green v. State*, *supra*), or where an accessory before the fact in one State to a felony committed in another was held to be indictable in the State where he became accessory (*State v. Chapin*, *supra*), or in certain cases of false pretences, or in conspiracies where an overt act is committed at the place of the trial, or where by statute a particular "section" of an offence committed in one jurisdiction is there made indictable; as, for instance, the act of shooting or unlawfully using a deadly weapon within the State, as in the present case. In some instances there may be concurrent jurisdiction of the whole offence, and in others there may exist the jurisdiction of an attempt in one State and of the consummated offence in another. In a note to the preceding section the author thus explains: "The place of such residence (that is, where the offence is started) has jurisdiction over the attempt or conspiracy as the case may be. The place of the consummation has jurisdiction of the offence consummated on its soil." In respect to this very matter the learned author has made his meaning entirely clear in his article on the conflict of laws. 1 Criminal Law Magazine, 695. In putting the case of A in New York shooting B in Connecticut, he says that the place of the consummation of the crime should be regarded as its locality. "Until such consummation a crime, so far as jurisdiction is concerned, is simply an attempt and only punishable as such. It may be indictable for A merely to discharge a gun. It may be said, 'This is a dangerous act, punishable as such;' or it may be said, 'From all the circumstances of the case we infer that you are attempting B's life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime in its completeness exhibits itself."

There being, then, no concurrent jurisdiction at common law,

we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in and partly out of the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or State in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." Kerr on Homicide, 226; *Commonwealth v. Macloon*, *supra*. It is not very seriously insisted on the part of the State that our statute (The Code, Sec. 1197) applies to this case, but inasmuch as it was referred to on the argument it is proper that we should briefly examine into its provisions. It provides:

"In all cases of felonious homicide, when the assault shall have been made within this State and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes as if the person assaulted had died within the limits of this State."

This statute has received a judicial construction by this court in *State v. Dunkley*, 3 Ired., 116, and it was held that it did not create any new offence, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited it can hardly be contended that the assault in the present case was committed in this State, and especially is this so when the assault mentioned in the statute evidently means not a mere attempt, but such an injury inflicted in this State which results in death in another State. This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offence, except the death, must have occurred in this State. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction, and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt, if any existed, upon this point by the opinion of Chief Justice Ruffin in *Dunkley's case*, *supra*. He says that the act "does not profess to define 'felonious homi-

cide,' or to constitute the crime by any particular acts, but merely says that, in certain cases of felonious homicide, the offender may be indicted and of course tried and punished in the county where the stroke was given—meaning, though it does not (like the statute 2 and 3, Edward VI.) expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.'” As it is plain that in contemplation of law the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the State of North Carolina cannot affect the conclusion we have reached. If, as we have seen, the offence was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offences abroad or on the high seas cannot be asserted by this State. Such jurisdiction does not exist as between the States of the Union under their peculiar relation to each other (Rorer's Interstate Law, 308), and even if it could be rightfully claimed it could not in a case like the present be enforced in the absence of a statute providing that the offence should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a statute (33 Hen. VII.) appears to have been necessary in order that the courts of that country could try a murder committed in Lisbon by one British subject upon another. *Rex v. Sawyer, Russell & Ryan Cr. Cases*, 294, cited and commented upon in *Dunkley's case, supra*. In *People v. Merrill*, 2 *Parker's Cr. Cases*, 600, it is said that by the common law offences were local and the jurisdiction in such cases depends upon statutory provisions. See, also, *Wheaton International Law*, 115; 1 *Wharton Cr. L.*, 271; 1 *Bishop Cr. Law*, 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that as to crimes committed by subjects in foreign civilized States, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offences directed against the sovereignty of the prosecuting State; perjury before consuls and forgery of government documents being included in this head." To the same effect is 3 *Am. and*

Eng. Enc., 539, in which it is said: "As to offences committed in foreign civilized lands the country of arrest has jurisdiction only of offences distinctively against its sovereignty." See, also, Dr. Wharton's article upon the subject in 1 Criminal Law Magazine, 715. As between the States the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a State can have no extra-territorial force, we are of the opinion that it is competent for the legislature to determine what acts within the limits of the State shall be deemed criminal, and to provide for their punishment. Certainly, there could be no complaint where all the parties concerned in the homicide are citizens of North Carolina. It may also be observed that in addition to its common law jurisdiction the State of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given we are constrained to say that the prisoners are entitled to a new trial.

State *v. Morrow*, 18 S. E. 853; *Simpson v. State*, 17 S. E. 984; *State v. Gessert*, 21 Minn. 369; *State v. Carter*, 27 N. J. L. 499; *State v. Kelly*, 76 Me. 331; *Green v. State*, 66 Ala. 40; *State v. Ross*, 76 N. C. 242; *Riley v. State*, 9 Humph. 646; *State v. Nyckoff*, 2 Vroom. 65; *U. S. v. Davis*, 2 Sumner 482; *State v. Cutshall*, 110 N. C. 538; 16 L. R. A. 130; *May*, Sec. 79; *Clark*, p. 360; *Bishop*, p. 109; *Wharton*, Sec. 288 *et seq.*; *Hawley & McGregor*, p. 68.

NOTE.—Some States hold that the homicide is committed where the death occurs.

Bishop I., Sec. 112-116; *Wharton*, Sec. 292; *Hawley & McGregor*, p. 69; *Tyler v. People*, 8 Mich. 320; *Com. v. Macloon*, 101 Mass. 1; *U. S. v. Guiteau*, 47 Am. Rep. 247; *Clark*, p. 363.

2. LIMITS OF THE UNITED STATES.

The territorial limits, and hence the jurisdiction of a country extends to its boundary, unless it is bounded by the sea, when its jurisdiction extends one marine league from low water mark. For determining criminal jurisdiction, ships are deemed a part of the territory of the country to which they belong.

REGINA v. KEYN.

13 Cox C. C. 403; L. R. 2 Exch. Div. 63.

THE prisoner was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young on the high seas, and within the jurisdiction of the Admiralty of England. The deceased was a passenger on board the *Strathelyde*, a British steamer bound from London to Bombay. This vessel, when one and nine-tenths of a mile from Dover pier-head, and within two and a half miles from Dover beach, was run down and sunk by the *Franconia*, a German steamer. In the collision, the deceased woman was drowned, and the prisoner, the captain of the *Franconia*, is convicted of manslaughter; but a question of law is reserved.

An objection was taken on the part of the prisoner that, inasmuch as he was a foreigner, in a foreign vessel, on a foreign voyage, sailing upon the high seas, he was not subject to the jurisdiction of any court in this country.

The crown contends that inasmuch as, at the time of the collision, both vessels were within the distance of three miles from the English shore, the offence was committed within the realm of England, and is triable by the English court.

The case was argued before Cockburn, C. J., Lord Coleridge, C. J., Kelly, C. B., Sir R. Phillimore, Bramwell, Pollock, and Amphlett, B. B., Lush, Brett Grove, Denman, Archibald, Field and Lindley, JJ.

COCKBURN, C. J. "The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

"The legality of the conviction is contested, on the ground that the accused is a foreigner; that the *Franconia*, the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offence was committed on the high seas. Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

"The facts on which this defence is based are not capable of being disputed; but a twofold answer is given on the part of the prosecution:—1st. That, although the occurrence on which the charge is founded took place on the high seas in this sense that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast; that by the law of nations, the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; that, consequently, the *Franconia*, at the time the offence was committed, was in English waters, and those on board were therefore subject to English law.

"Secondly. That, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel; and that, as a British vessel is, in point of law to be considered British territory, the offence, having been consummated by the death of the deceased in a British ship, must be considered as having been committed on British territory. * * *

"According to the general law, a foreigner who is not residing permanently or temporarily in British territory, or on board a British ship, cannot be held responsible for an infraction of the law of this country.

"Unless, therefore, the accused, Keyn, at the time the offence of which he has been convicted was committed, was on British territory or on board a British ship, he could not be properly brought to trial under British law, in the absence of express legislation. * * *

"In the reign of Charles II., Sir Leoline Jenkins, then the

judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty sessions at the Old Bailey, not only asserted the king's sovereignty within the four seas, and that it was his right and province 'to keep the public peace on these seas'—that is, as Sir Leoline expounds it, 'to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions,' but extended this authority and jurisdiction of the king. 'To preserve the public peace and to maintain the freedom and security of navigation all the world over; so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the king be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of Oyer and Terminer as this is, in such county, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the laws given to his vicegerent the king.' * * *

"Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea.

"The Portuguese claimed to bar the ocean route to India and the Indian Seas to the rest of the World, while Spain made the like assertion with reference to the West.

"All these vain and extravagant pretensions have long since given way to the influence of reason and common sense.

"If, indeed, the sovereignty thus asserted had a real existence, and could now be maintained, it would of course, independently of any question as to the three-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas than the sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas; or that the Court of Admiralty could try a foreigner for an offence committed in a foreign vessel in all parts of the Channel.

"No writer of our day, except Mr. Chitty in his treatise on the

prerogative, has asserted the ancient doctrine. Blackstone, in his chapter on the prerogative in the Commentaries, while he asserts that the narrow seas are part of the realm, puts it only on the ground that the jurisdiction of the Admiralty extends over these seas.

"He is silent as to any jurisdiction over foreigners within them. The consensus of jurists, which has been so much insisted on as authority, is perfectly unanimous as to the non-existence of any such jurisdiction. Indeed, it is because this claim of sovereignty is admitted to be untenable that it has been found necessary to resort to the theory of the three-mile zone.

"It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone.

"If this rule is to prevail, it must be on altogether different grounds. To invoke, as its foundation or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell. I must confess myself unable to comprehend how, when the ancient doctrine as to sovereignty over the narrow seas is adduced, its operation can be confined to the three-mile zone. If the argument is good for anything, it must apply to the whole of the surrounding seas. But the counsel for the crown evidently shrank from applying it to this extent. Such a pretension would not be admitted or endured by foreign nations. That it is out of this extravagant assertion of sovereignty that the doctrine of the three-mile jurisdiction, asserted on the part of the crown, and which, the older claim being necessarily abandoned, we are now called upon to consider, has sprung up, I readily admit. * * *

"With the celebrated work of Grotius, published in 1609, began the great contest of the jurists as to the freedom of the seas.

"The controversy ended, as controversies often do, in a species of compromise. While maintaining the freedom of the seas, Grotius, in his work *De Jure Belli et Pacis*, had expressed an opinion that, while no right could be acquired to the exclusive

possession of the ocean, an exclusive right or jurisdiction might be acquired in respect of particular portions of the sea adjoining the territory of individual states. * * *

"Other writers adopted a similar principle, but with very varying views as to the extent to which the right might be exercised. Albericus Gentiles extended it to 100 miles; Baldus and Bodinus to sixty.

"Loccenius (*De Jure Maritimo*, ch. iv., s. 6) puts it at two days' sail; another writer makes it extend as far as could be seen from the shore. Valin, in his Commentary on the French Ordinances of 1681 (ch. v.), would have it reach as far as bottom could be found with the lead line. * * *

"Differing altogether from these writers as to the extent of maritime sovereignty, Bynkershoek, an advocate, like Grotius, for the *mare liberum*, and who entered the lists against Selden as to the dominion of England in the so-called English Sea, in his treatise *De Dominio Maris*, published in 1702, follows up the idea of Grotius as to a limited dominion of the sea from the shore. * * *

"After combating the doctrine of a *mare clausum* as regards the sea at large, and enumerating these inconsistent opinions, which he seems little disposed to respect, Bynkershoek continues: 'Hinc videas priscos juris magistros, qui dominium in mare proximum ausi sunt agnoscere, in regundis ejus finibus admodum vagari incertos.' 'Quare omnino videtur rectius,' he adds, after disposing of the foregoing opinions, 'Eo potestatem terræ extendi, quousque tormenta exploduntur; eatenus quippe, cum imperare, tum possidere videmur. Loquor autem de his temporibus; quibus illis machinis utimur; alioquin generaliter decendum esset, potestatem terræ finiri, ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur.'

"We have here, for the first time, so far as I am aware, a suggestion as to a territorial dominion over the sea, extending as far as cannon-shot would reach—a distance which succeeding writers fixed at a marine league, or three miles. Prior to this, no one had suggested such a limit.

"The jurisdiction, assumed in the Admiralty commissions, or exercised by the Court of King's Bench in the time of the Edwards, was founded on the king's alleged sovereignty over the

whole of the narrow seas; it had no reference whatever to any notion of a territorial sea. To English lawyers the idea of this limited jurisdiction was utterly unknown.

"With Selden and Hale, they stood up stoutly for the king's undivided dominion over the four seas. No English author makes any distinction, as regards the dominion of the crown, between the narrow seas as a whole and any portion of them as adjacent to the shore. The doctrine was equally unknown to the Scotch lawyers. * * *

"Even to our times the doctrine of the three-mile zone has never been adopted by the writers on English law. To Blackstone who, in his Commentaries, treats of the sea with reference to the prerogative, as also to his modern editor, Mr. Stephen, it is unknown; equally so to Mr. Chitty, whose work on the prerogative is of the present century. It was not till the beginning of this century that any mention of such a doctrine occurs in the courts of this country. But to the continental jurists, the suggestion of Bynkershoek seemed a happy solution of the great controversy as to the freedom of the sea; and the formula, *potestas finitur ubi finitur armorum vis*, was a taking one; and succeeding publicists adopted and repeated the rule which their predecessor had laid down, without much troubling themselves to ascertain or inquire whether that rule had been recognized and adopted by the maritime nations who were to be affected by it. * * *

"But to what, after all, do these ancient authorities amount? Of what avail are they toward establishing that the soil in the three-mile zone is part of the territorial domain of the crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining—what foreign jurists who would not deny—what foreign government which would not repel such a pretension? I listened carefully to see whether such an assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me, that when the sovereignty and juris-

diction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it, must necessarily go with it. * * *

"It thus appearing, as it seems to me that the littoral sea beyond low-water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that which was before high sea have been converted into British territory, without any action on the part of the British government or legislature—by the mere assertions of writers on public law—or even by the assent of other nations?

"And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked, upon what authority are these statements founded?

"When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

"For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world.

"For writers on international law, however valuable their labors may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage,—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial ap-

plication of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

"When I am told that all other nations have assented to such an absolute dominion on the part of the littoral state, over this portion of the sea, as that their ships may be excluded from it, and that, without any open legislation, or notice to them or their subjects, the latter may be held liable to the local law, I ask first what proof there is of such assent as here asserted; and, secondly, to what extent has such assent been carried; a question of infinite importance, when undirected by legislation, we are called upon to apply the law on the strength of such assent. It is said that we are to take the statements of the publicists as conclusive proof of the assent in question, and much has been said to impress on us the respect which is due to their authority, and that they are to be looked upon as witnesses of the facts to which they speak, witnesses whose statements, or the foundation on which those statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with the matters of judicial principle and opinion, but we are here dealing with a question not of opinion but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based.

"The question is not one of theoretical opinion, but of fact, and, fortunately, the writers upon whose statements we are called upon to act have afforded us the means of testing those statements by reference to facts. They refer us to two things, and to these alone—treaties and usage.

"Let us look a little more closely into both.

"First, then, let us see how the matter stands, as regards treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has ever been the subject of diplomatic discussion. It has been entirely the creation of the writers on international law. It is true that the writers who have been cited, constantly refer to treaties in support of the doctrine they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only—the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on international law as to adopt the three miles range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each other's coasts as neutral territory, within which no warlike operations should be carried on; instances of which will be found in the various treatises on international law. Thus for instance, in the treaties of commerce, between Great Britain and France, of September, 1786; between France and Russia, of January, 1787; between Great Britain and the United States, of October, 1794, each contracting party engages, if at war with any other nation, not to carry on hostilities within cannon shot of the coast of the other contracting party; or, if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of the like tenor, a list of which is given by Azuni (vol. II, p. 78); and various ordinances and laws have been made by the different states in order to give effect to them.

"Again, nations, possessing opposite or neighboring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance.

Such, for instance, are the treaties made between this country and the United States, in relation to the fishery off the coast of Newfoundland, and those between this country and France, in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

"But in all these treaties this distance is adopted, not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency; for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous.

"Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fisherman would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty. For what object, then, have treaties been resorted to? Manifestly in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations.

"Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging for these purposes, to the local state.

"But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of everything else, a recognition, by the common assent of nations, of the principle that the subjects of one state

passing in ships within three miles of the coast of another, shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think that these treaties help us much toward arriving at the conclusion that this appropriation has actually taken place. At all events, the question remains, whether judicially we can infer that the nations who have been parties to these treaties, and, still further, those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference so apply the criminal law of this country.

"The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, likewise presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of the, to my mind, still more serious difficulty, that we should be assuming it without legislative warrant.

"So much for treaties. Then how stands the matter as to usage, to which reference is so frequently made by the publicists in support of their doctrine?

"When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage as to the application of the general law of the local state to foreigners on the littoral sea, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present.

"It may well be, I say again, that—after all that has been said and done in this respect—after the instances which have been

mentioned of the adoption of the three-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offences, would not be considered as infringing the rights of other nations. But I apprehend that as the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control.

"That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country—leaving the question of its consistency with international law to be determined between the governments of the respective nations—can of course admit of no doubt. The question is whether such legislation would not, at all events, be necessary to justify our courts in applying the law of this country to foreigners under entirely novel circumstances in which it has never been applied before. * * *

"It is unnecessary to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law.

"That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation.

"I am clearly of opinion that we cannot, and that it is only in the instance in which foreigners on the sea have been made specifically liable to our law by statutory enactment that that law can be applied to them. * * *

"Hitherto, legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of

the revenue and fishery laws, and, under particular circumstances, to cases of collision.

"In the two first legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, namely, the right of a state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws. * * *

"It is apparent that, with the exception of the penalties imposed for violation of neutral duties or breaches of the revenue or fishery laws, there has been no assertion of legislative authority in the general application of the penal law to foreigners within the three-mile zone. The legislature has omitted to adopt the alleged sovereignty over the littoral sea, to the extent of making our penal law applicable generally to foreigners passing through it for the purpose of navigation. Can a court of justice take upon itself, in such a matter, to do what the legislature has not thought fit to do—that is, make the whole body of our penal law applicable to foreign vessels within three miles of our coast?

"It is further apparent from these instances of specific legislation that, when ascertaining its power to legislate with reference to the foreigner within the three-mile zone, Parliament has deemed it necessary, wherever it was thought right to subject him to our law, expressly to enact that he should be so. We must take this, I think, as an exposition of the opinion of Parliament that specific legislation is here necessary, and consequently, that without it the foreigner in a foreign vessel will not come within the general law of this country in respect of matters arising on the sea.

"Legislation, in relation to foreign ships coming into British ports and waters, rests on a totally different principle, as was well explained by Dr. Lushington, in the case of *The Annapolis*. (Lush. Adm. 295.)

" 'The Parliament of Great Britain it is true,' says Dr. Lushington, 'has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction; though, if Parliament thought fit so to do, this court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to

legislate without violating any rule of international law, and the construction has been accordingly.

“Within, however, British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers *intra fauces*, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate. I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament whether those requisitions be, as in former times, certificates of origin, or clearance of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters.

“Whether the Parliament has so legislated is now the question to be considered.” * * *

“In the result, looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been wholly abandoned—to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea—to the fact that the right of absolute sovereignty therein, and of penal jurisdiction over the subjects of other states, has never been expressly asserted or conceded among independent nations, or, in practice, exercised, and acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand on a different footing as well as to the fact that, neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three-mile zone, so as to enact that all offences committed upon it, by foreigners in foreign ships, should be within the criminal law of this country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law, has done so by express and specific legislation. I cannot think that, in the absence of all precedent, and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an

offence, committed under such circumstances, to be punishable by the law of England, especially as in so holding we must declare the whole body of our penal law to be applicable to the foreigner passing our shores in a foreign vessel on his way to a foreign port. * * *

"Having arrived at this conclusion, it becomes necessary to consider the second point taken on the part of the crown, namely, that though the negligence of which the accused was guilty occurred on board a foreign ship, yet, the death having taken place on board a British ship, the offence was committed within the jurisdiction of a British court of justice. * * *

"The question is—and this appears to me to have been lost sight of in the argument—not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction.

"But in point of fact, the defendant was, at the time of the occurrence, not on board the British ship, the *Strathclyde*, but on a foreign ship, the *Franconia*. * * *

"But in order to render a foreigner liable to the local law, he must, at the time the offence was committed, have been within British territory if on land, or in a British ship if at sea. I cannot think that if two ships of different nations met on the ocean, and a person on board of one of them were killed or wounded by a shot fired from the other, the person firing it would be amenable to the law of the ship in which the shot took effect."

LUSH, J., said, in part: "In the reign of Richard II., the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas.

"At that period the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by act of Parliament. As no such act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. There-

fore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an act of Parliament."

LORD COLERIDGE, C. J., dissenting from the opinion of the majority, said, in part * * * "But, first, I think the offence was committed within the realm of England; and if so, there was jurisdiction to try it. * * *

"Now the offence was committed much nearer to the line of low-water mark than three miles; and therefore, in my opinion, upon English territory. I pass by for the moment the question of the exact limit of the realm of England beyond low-water mark, I am of opinion that it does go beyond low-water mark; and if it does, no limit has ever been suggested which would exclude from the realm the place where this offence was committed. But for the difference of opinion of the bench, and for the great deference which is due to those who differ from me, I should have said it was impossible to hold that England ended with low-water mark. I do not of course forget that it is freely admitted to be within the competency of Parliament to extend the realm how far soever it pleases to extend it by enactments, at least so as to bind the tribunals of the country; and I admit equally freely that no statute has in plain terms, or by definite limits, so extended it.

"But, in my judgment, no Act of Parliament was required. The proposition contended for, as I understand, is that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water mark, unless it happens on board a British ship, the foreigner cannot be tried, and is punishable. * * *

"By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coasts of which they wash. * * *

"This is established as solidly, as, by the very nature of the case, any proposition of international law can be. Strictly speaking, international law is an inexact expression and it is apt to

mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors.

"But there is no common law-giver to sovereign states and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals. Neither, certainly does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement. * * *

"We find a number of men of education, of many different nations, most of them uninterested in maintaining any particular thesis as to the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark.

"I can hardly myself conceive stronger evidence to show that, as far as it depends on the agreement of nations, the territory of maritime countries does so extend. * * *

"If the matter were to be determined for the first time, I should not hesitate to hold that civilized nations had agreed to this prolongation of the territory of maritime states, upon the authority of the writers who have been cited in this argument as laying down the affirmative of this proposition. * * *

"Furthermore, it has been shown that English judges have held repeatedly that these coast waters are portions of the realm. It is true that this particular point does not seem ever distinctly to have arisen. But Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L. C., Erle, C. J., and Lord Wensleydale (and the catalogue might be largely extended) have all, not hastily, but in writing, in prepared and deliberate judgments, as part of the reasoning necessary to support their conclusions, used language, some of them repeatedly, which I am unable to construe, except as asserting, on the part of these eminent persons, that the realm of England, the territory of England, the property of the

state and crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast, as to include the place where this offence was committed. * * * The English and American text writers, and two at least of the most eminent American judges, Marshall and Story, have held the same thing.

"Further—at least in one remarkable instance—the British Parliament has declared and enacted this to be the law. In the present reign two questions arose between Her Majesty and the Prince of Wales as to the property in minerals below high-water mark around the coast of Cornwall. The first question was as to the property in minerals between high- and low-water mark around the coasts of that county; and as to the property in minerals below low-water mark won by an extension of workings begun above low-water mark.

"The whole argument on the part of the crown was founded on the proposition that the *fundus maris* below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the crown. The Prince was in possession of the disputed mines; he had worked them from land undoubtedly his own; and, therefore, unless the crown had a right of property in the bed of the sea, not as first occupier—for the Prince was first occupier, and was in occupation—the crown must have failed. * * * Sir John Patterson * * * thus expressed himself.—'I am of opinion, and so decide, that the right to the minerals below low-water mark remains and is vested in the crown, although those minerals may be won by workings commenced above low-water mark and extended below it,' and he recommended the passing of an act of Parliament to give practical effect to his decision, so far as it was in favor of the crown. The act of Parliament accordingly was passed, the 21 & 22 Vict. c. 109.

"We have therefore, it seems, the express and definite authority of Parliament for the proposition that the realm does not end with low-water mark, but that the open sea and the bed of it are part of the realm and of the territory of the sovereign. If so, it follows that British law is supreme over it, and that the law must be administered by some tribunal. It cannot, for the reasons assigned by my Brother Brett, be administered by the judges of

Oyer and Terminer; it can be, and always could be, by the Admiralty, and if by the Admiralty, then by the Central Criminal Court."

The court quashed the conviction.

The majority of the court was composed of Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.—Lord Coleridge, C. J., Brett, and Amphlett, J. A., Grove, Denman and Lindley, JJ., dissenting.

Manchester v. Mass., 139 U. S. 240; *Com. v. Manchester*, 152 Mass. 230; *U. S. v. Davis*, 2 Sumner 482; *U. S. v. Bennett*, 3 Hughes 466; *Regina v. Anderson*, 11 Cox C. C. 198; *Wildenhus Case*, 120 U. S. 1, *U. S. v. Rodgers*, 150 U. S. 249; *U. S. v. Gordon*, 5 Blatch. 18; *Bish. Cr. Law*, Sec. 102; *Snow's Cases Inter. Law*, p. 55, and note p. 71; *Bish. I.*, Secs. 102-108; *Clark*, p. 357; *Wharton*, Secs. 269, 270; *Hawley & McGregor*, p. 70.

NOTE.—If islands lie in proximity to the coast, the measurement outwards is from these, and bays and gulfs the distance across the mouth of which does not exceed two marine leagues are wholly within the territorial limits.

Bish. Criminal Law, 104, 105; *The Anna*, 5 Rob. Adm. 373, 385; *Com. v. Garries*, 2 Va. Cas. 172; *S. v. Hoofman*, 9 Md. 28; *Direct U. S. Cable Co. v. Anglo-Amer. Tel. Co.*, 2 Ap. Cas. 394; *Bish. I.*, Sec. 104; *Clark*, p. 358; *Hawley & McGregor*, 70.

NOTE.—In the absence of treaties, international law runs the dividing lines in the middle of streams and our great lakes, except that the islands of our great lakes are wholly within the territory of one or the other of the adjoining powers.

Tyler v. People, 8 Mich. 320; *Com. v. Rodgers*, 150 U. S. 249; *Wheaton Inter. Law*, 252; *Bish. Cr. Law*, Sec. 108; *Clark*, p. 358.

3. LIMITS OF THE STATES AND COUNTIES.

In the United States the limits of the States and counties are coincident, and the States have jurisdiction of all criminal acts committed on rivers, havens, creeks, basins or bays within their territorial limits.

UNITED STATES *v.* GRUSH.

Circuit Court of the United States, 1829.

5 Mason, 290.

INDICTMENT against the prisoner for an assault on one Neil Lemon with a dangerous weapon, and with an intent to kill, founded on the act of Congress of 1825, ch. 276, sec. 22. The indictment contained several counts, in some of which the offence was alleged to be committed on the high seas, and in others in Massachusetts Bay. The prisoner pleaded not guilty, and was convicted of the offence by the jury. Appeal taken.

STORY, J. It is agreed between the parties, that the place where the vessel (the *Pacific*), on board of which the offence was committed, lay at anchor at the time of the commission of the offence, was between Lovel's Island, George's Island, and Gallop's Island, which belong to the city of Boston, as part of its territorial limits. The tide ebbs and flows between these islands into what is called the inner harbor of Boston; and at all times of the tide there is a great depth of water there, the bottom or channel never being dry; and vessels at anchor there are constantly afloat in the stream. The distance between these islands is about one-eighth of a mile. Hale's map of Boston, and Wadsworth's chart of the harbor of Boston and the adjacent coasts and headlands are admitted in evidence, as accurate delineations of the same. The nearest headlands on the main land on each side are the town of Hull on the southern, and Point Shirley on the northern side of the harbor of Boston, and the distance between these headlands is about five or six miles. There are a

number of islands between these headlands, with narrow inlets and passages for vessels between them. The main channel into the inner harbor of Boston flows also between them, in no instance exceeding one mile in breadth. Nantasket Roads, as it is called, or the outer harbor of Boston, where vessels, going from and coming to the port, are accustomed to lie at safe anchorage, is on the side contiguous to Hull. There are several islands farther out toward the ocean; and particularly the Great Brewster, on which the principal light-house stands. The extreme point of the main land, jutting from the southern coast opposite to this light-house, is called Point Alderton, and the distance between them is about one mile and a quarter. Processes from the State courts of the county of Suffolk have been at all times, without objection, served as far down as where the Pacific lay; and even down to the light-house on the Great Brewster; but not below. Vessels are accustomed to anchor, where the Pacific lay. The towns of Boston and Chelsea constitute the county of Suffolk. Such are the material facts.

The statute, on which the present indictment is founded (Stat. of 1825, ch. 276, sec. 22), declares, "that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel, etc., etc. shall with a dangerous weapon, or with intent to kill, etc. commit an assault on another such person shall on conviction thereof be punished," etc., etc.

There cannot, I think, be any doubt as to what is the true meaning of the words, "high seas," in this statute. Mr. Justice Blackstone, in his Commentaries (1 Com. 110), uses the words "high sea" and "main sea" (*altum mare*, or *le haut meer*) as synonymous; and he adds, "that the main sea begins at the low water mark." But though this may be one sense of the terms, to distinguish the divided empire, which the admiralty possesses between high water and low water mark, when it is full sea, from that which the common law possesses, when it is ebb sea; yet the more common sense is, to express the open, uninclosed ocean, or that portion of the sea, which is without the *faucēs terræ* on the sea coast, in contradistinction to that, which is surrounded, or inclosed between narrow headlands or promontories. Thus Lord

Hale says (*De Jure Maris*. Harg. Tracts, ch. 4, p. 10), "the sea is either that, which lies within the body of the county, or without. That arm or branch of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner;" and for this he cites Fitz. Abridg. Corone. 399, 8 Edw. 2. And then he adds, "The part of the sea, which lies not within the body of a county, is called the main sea, or ocean." In *United States v. Wiltberger* (5 Wheat. R. 76, 94), Mr. Chief Justice Marshall, in delivering the opinion of the court, manifestly inclined to the same interpretation of the words "high seas," in our penal code. If (says he) "the words be taken according to the common understanding of mankind, if they be taken in their received and popular sense, the 'high seas,' if not in all instances confined to the ocean, which washes a coast, can never extend to a river about half a mile wide in the interior of a country." The other words descriptive of place in the present statute, give great additional weight to this suggestion; for if "high seas" meant to include other waters, why should the supplemental words, "arm of the sea, river, creek, bay," etc. have been used? Lord Hale, following the exact definition given in the book of Assizes (22 Assiz. 93), says, "That is called an arm of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows." Both he and Lord Coke constantly limit the "high seas" to those waters of the ocean, which are without the boundary of any county at the common law; and we shall presently see, that narrow arms of the sea are deemed to be within the boundary of some county of the realm. But the waters of the ocean upon the open sea-coast are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty up to high water mark, when the tide is full; and are deemed by the crown writers, generally, as the high sea or main sea.

From this view of the subject, I am entirely satisfied, as well upon the language of the authorities, as the descriptive words in the context, that the words "high seas" in this statute are used in contradistinction to arms of the sea, and bays, creeks, etc. within the narrow headlands of the coast, and comprehend only

the open ocean, which washes the sea-coast, or is not included within the body of any county in any particular State. And upon the facts admitted in the present case, the place, where the offence was committed, is not the "high seas," in this sense of the terms. It is, in my judgment, "an arm of the sea," in the proper definition of that phrase. But an arm of the sea may include various subordinate descriptions of waters, where the tide ebbs and flows. It may be a river, harbor, creek, basin, or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country. My own opinion is, that arms of the sea, whether of the one description or the other, are within the admiralty and maritime jurisdiction of the United States. But if they are within the body of any county of a particular State, the State has also concurrent jurisdiction therein. I do not now go over the grounds of this opinion, having upon other occasions gone into them somewhat at large. But to bring a case within the purview of the present statute, it is not sufficient, that the place, where the offence is committed, is within the admiralty jurisdiction of the United States, whether it be an arm of the sea, creek, or bay, etc.; but it must, by the very words of the statute, also be a place "out of the jurisdiction of any particular State." And it is out of the jurisdiction of the State, in the sense of this statute, if it be not within the body of some county within the State.

This leads me to consider what is the proper boundary of counties bordering on the sea-coast, according to the established course of the common law; for to that I shall feel myself bound to conform on the present occasion, whatever might have been my doubts, if I were called to decide upon original principles. The general rule, as it is often laid down in the books, is, that such parts of rivers, arms, and creeks of the sea, are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale uses more guarded language, and says, in the passage already cited, that the arm or branch of the sea, which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hawkins (Pl. Cr. b. 2, ch. 9, sec. 14) has expressed the rule in its true sense, and confines it to such parts of the sea, where a man standing on the one side may see

what is done on the other. And this is precisely the doctrine, which is laid down by Stanton, J. in the passage in Fitz. Abridg. Corone. 399; 8 Edw. 2; on which Lord Coke and the common lawyers have laid so much stress as furnishing conclusive authority in their favor. It is there said, "It is no part of the sea, where one may see what is done on the one part of the water, and the other, as to see from one land to the other." And Mr. East, in his Treatise on Common Law (2 East, P. C. ch. 17, sec. 10, p. 804), manifestly considers this as the better opinion.

In applying the law to the State of facts presented in the present case, I confess, that there does not seem to me any reason to doubt, that the place where the offence was committed was within the county of Suffolk. It is not necessary to decide, whether it be a bay, or haven, within the statute, though it might, perhaps, indifferently fall within each denomination, for it is a narrow arm of the sea, and also a place of safe anchorage for vessels. It appears to me, that where there are islands enclosing a harbor, in the manner in which Boston harbor is enclosed, with such narrow straits between them, the whole of the waters must be considered as included within the body of the county. It is certain, that the islands themselves are within the county of Suffolk; and whether they are inhabited or not, can make no difference in the principles of law. Islands so situated must be considered as the opposite shores, in the sense of the common law, where persons, standing on one side, may see what is done on the other. There can be no doubt, from the proximity of Gallop's, Lovel's, and George's Islands to each other, that any person, on either of their shores, could see what was done on the other. I do not understand by this expression, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguished from each other. Indeed, upon the evidence before me, I incline strongly to the opinion, that the limits of the county of Suffolk, in this direction, not only include the place in question, but all the waters down to a line running across from the light-house on the Great Brewster to Point Alderton. In the sense of the common

law, these seem to me the true *fauces terræ*, where the main ocean terminates.

Upon the whole, my opinion is, that the court, upon the facts, has no jurisdiction, and that a new trial ought to be granted. This renders it unnecessary to consider, whether the other point, made in arrest of judgment, can be maintained. I allude to the objection, that, in the caption of the indictment, after the usual beginning, "United States of America, District of Massachusetts," the letters (ss.) are omitted. The point has, however, been argued; and, as at present advised, it strikes me to be clearly not maintainable as a valid objection.

The district judge concurs in this opinion; and therefore a new trial must be granted. Notice must be given to the proper prosecuting officers of the State, that the prisoner may be dealt with according to law in the State courts.

Com. v. Peters, 12 Metc. 387; *U. S. v. Bevans*, 3 Wheaton 336; *U. S. v. Wilson*, 3 Blatch. 436; *Com. v. Alger*, 7 Cush. 53; *Pollard v. Hagan*, 3 How. (U. S.) 212; *U. S. Rev. Stat.*, Sec. 5339 *et seq.*; *Clark*, p. 357, 358; *Bishop I.*, Sec. 146 *et seq.*

NOTE.—Some States have specifically enacted this by statute.

Com. v. Gaines, 2 Vas. Cas. 172; *Manley v. People*, 7 N. Y. 295; *Manchester v. Mass.*, 139 U. S. 240; *People v. Tyler*, 7 Mich. 161; *Clark*, p. 359; *Bish.*, Secs. 105, 108, 148, 173, 176.

NOTE.—On non-navigable rivers the line extends to the mid-distance between the banks, but on navigable rivers to the thread of the stream—that is, to the middle channel; and if there are several channels, to the middle of the principal one, or rather the one usually followed.

Iowa v. Ill., 147 U. S. 1; *Buck v. Ellenbolt*, 15 L. R. A. 187; *Dunleith v. Bridge Co.*, 15 Ia. 558; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; *State v. Mullen*, 35 Ia. 199.

NOTE.—But the Ohio river between Indiana and Kentucky is in Kentucky, Ohio extending to the low water mark on her side of the river; and the waters of the Hudson river between New York and New Jersey are entirely within the jurisdiction of New York.

Indiana v. Kentucky, 136 U. S. 479; *Handly v. Anthony*, 5 Wheat. 374; *Church v. Chambers*, 3 Dana 274; *McFall v. Com.*, 2 Met. (Ky.) 394; *McFarland v. McKnight*, 6 B. Mon. 510; *ex parte Devoe Manf. Co.*, 108 U. S. 401; *People v. Central R. R.*, 42 N. Y. 283; *The Norma*, 32 Fed. Rep. 411; *Clark*, p. 358; *Bishop I.*, Sec. 150.

NOTE.—Both Wisconsin and Minnesota courts would have jurisdiction to punish a crime committed on an island in the Mississippi river on either side of the channel, as the enabling acts of Wisconsin and Minnesota give States concurrent jurisdiction.

State v. George, 63 N. W. 100; *Minn. Stat.* 1894, Sec. 4835, 4836.

NOTE.—In Minnesota a person who, having stolen property in a foreign State, brings it into the State, is triable in any county through which he passes; also, having stolen property within the State, he may be indicted in any county through which he passes with it.

Minn. Stat. 1894, Sec. 6721-6722; *Nash v. State*, 2 Greene 286.

NOTE.—In Minnesota offences committed on boundary lines of counties or within 100 yards of the same are indictable in either county.

Minn. Stat. 1894, Sec. 7258; *State v. Masteller*, 45 Minn. 128; *State v. Robinson*, 14 Minn. 447; *State v. New*, 22 Minn. 76; *State v. Anderson*, 25 Minn. 66; *Com. v. Gillon*, 2 Allen 502.

NOTE.—In Minnesota duelling outside the State under a plan conceived within the State may be tried in any county within the State.

Minn. Stat. 1894, Sec. 6493.

NOTE.—Indictment for libel in this State may be found in any county within the State where the paper is published or circulates.

Minn. Stat., Sec. 6503.

NOTE.—For offences in Minnesota committed on a railroad train or a boat, the indictment may be brought in any county through which the conveyance passes or its journey begins or ends.

Minn. Stat. 1894, Sec. 6846.

4. UNITED STATES WITHIN STATE LIMITS.

a.

Exclusive Jurisdiction.

The admiralty and maritime jurisdiction of the United States extends not only to the high seas, but to all internal navigable streams.

The United States has exclusive jurisdiction over all criminal acts committed within territory ceded to it; and also exclusive jurisdiction of all acts in violation of the regulations controlling foreign and interstate commerce.

STATE *v.* ZULICH.

Supreme Court of New Jersey, 1862.

5 Dutcher, 409 (29 N. J. L.).

OGDEN, J. The writ in this case was allowed on the application of the father of the prisoner. In his petition, presented to

me at chambers, he alleged that his son, under the age of eighteen years, was illegally and unjustly confined and detained by C. Meyer Zulich, Lieutenant-Colonel of the Second Regiment of the District of Columbia Volunteers. At the time specified for the return, the defendant produced the body of his prisoner before me, and returned with the writ, that he detained the prisoner because, on the 31st of January, 1862, he duly enlisted in the army of the United States, in Company C, of the District of Columbia Volunteers, and was duly and voluntarily sworn in, as a soldier of the army of the United States, for the term of three years, unless sooner discharged by the proper authority—he at the time representing himself to be over the age of twenty-one years; that afterwards, and during the term of service, he deserted from the army, and fled to the city of Newark, and that in compliance with special military orders, copies of which are appended to the return, he arrested the party in Newark, New Jersey, as a deserter, and holds him as a prisoner, being about to deliver him up to his commanding officer, in the city of Washington, for trial by a court martial.

The petitioner traversed the return in writing, by denying that his son was duly enlisted as a soldier in the army of the United States, or sworn in, as set forth in the return, stating, that at the time of the pretended enlistment he was under seventeen years of age, with his father in Newark; and that the pretended enlistment was without the knowledge or consent of the father or mother, or guardian or master of the infant. He also denies that the prisoner is a deserter from the army, and alleges that his arrest, confinement, and detention are illegal and unjust.

At the time and place fixed by me for a hearing, the district attorney of the United States, in behalf of the officer, moved that the prisoner should be remanded to custody, because the return showed a state of facts which divested a state tribunal of jurisdiction. It was contended that inasmuch as the return judicially apprized me that the party is in custody under the authority of the United States, I, acting under the authority of the State, could proceed no further with the investigation.

This insistent has brought up the interesting question, whether in such cases the authority of the general government is supreme, and the jurisdiction of its judicial tribunals is exclu-

sive, or whether the State tribunals, in the use of the writ of *habeas corpus*, have concurrent jurisdiction with that of the United States in granting relief in case of an unlawful imprisonment by an officer of the United States under color or by pretext of the authority of the United States.

The matter has frequently been discussed, and has received different decisions in different States of the Union. As early as 1819, Mr. Justice Southard, in delivering the opinion of the Supreme Court in the case of Anderson, where the question of jurisdiction was waived, took occasion to say, that it would "require in him a great struggle, both of feeling and judgment, even to arrive at the point where he would be prepared to deny the jurisdiction of the State, and say that the highest tribunals of the State are incapable of inquiring into the imprisonment of her citizens, no matter how gross or illegal it may be, provided, it be by agents of the United States, and under color of their laws."

The judicial power of the United States is commensurate with every case arising under the laws of the Union, and the federal courts, by acts of Congress, have jurisdiction, exclusive of the State courts, of all crimes and offences cognizable under the authority of the United States. Hence Chief Justice Kent, in Ferguson's case, said that abuses of the authority of the United States were offences against the United States, and exclusively cognizable in their courts; and that when the State courts have not jurisdiction over the whole subject matter of the imprisonment, and the federal courts have, by indictments as well as by *habeas corpus*, it appeared to him that there was a manifest want of jurisdiction in the case.

The latest discussion of this delicate and interesting question is found in the opinion of Chief Justice Taney, delivered in 1858, in the case of Booth, charged with aiding and abetting the escape of a fugitive slave, reported in 21 Howard. After stating at length the powers conferred upon the general government by the constitution, and those surrendered expressly by the States, and the establishment and jurisdiction of the federal courts, he concludes, that although State courts are authorized to grant a writ of *habeas corpus*, yet when it appears that the person for whose discharge it is employed is in custody under the au-

thority of the United States the State jurisdiction ceases; that the prisoner being within the dominion and exclusive jurisdiction of the United States, their tribunals alone can punish him for an offence against their laws; and if wrongfully imprisoned, their judicial tribunals alone can release him and afford him redress. He indeed goes the length of saying, that although it be the duty of the officer of the government to make known to the State tribunal, by a proper return to the writ, the authority under which he detains a prisoner, it is his imperative duty to hold on to him under the authority of the United States, and to refuse obedience to the mandate or process of any other government; that he should not take the prisoner before a State tribunal upon a *habeas corpus* issued under State authority; and that it would be his duty to resist any attempt to control him in the custody of his prisoner, and to call to his aid any force that might be necessary to maintain the authority of the law against illegal interference.

The exigencies of the service certainly require that the contracts of enlistment should be rigidly enforced where they are not void for illegality; and public policy and the effectiveness of our army demand uniformity of decisions in matters of such vital interest. Enlistments are made under the laws of the United States, constitutionally enacted. The federal tribunals in the different States, deriving power from and being responsible to the same source and authority, having complete if not exclusive jurisdiction over such subject matters by the use of the writ of *habeas corpus* and otherwise, it would be no abridgment of the right of the citizen to be protected in the enjoyment of his personal liberty, in such case to turn him over to the judicial power of the United States, where ready and effectual aid is provided by law for his security.

If the construction of the laws for enlistments and of the rules and articles of war be intrusted to State tribunals, the decisions may vary with the notions which prevail in different territorial spaces upon the doctrines of State sovereignty, and deserters be thus encouraged to betake themselves to States where lax views might prevail respecting the importance of maintaining the integrity of our arms in the existing national difficulties. If this case rested on the legality of the enlistment, I should decidedly incline to leave the petitioner to the action of the federal tribunals.

But the return states a fact, which makes it eminently proper that the officer should retain the custody of his prisoner. He is not the commandant of the corps to which the prisoner was attached, but being in the service of the United States, he was detailed by a competent military authority to proceed from Washington to different places in this State to arrest deserters; and acting in that executive capacity, he arrested Kniesch as a deserter in Newark, and is about to report him to the commanding officer at Washington, and returns that he holds the person prisoner as a deserter. His authority to arrest and detain rests upon his deputation to overtake deserters, and he cannot be presumed to have personal knowledge of the enlistment.

He was not required to know the facts of the case beyond those which show jurisdiction in the authority by which he was deputed, the enlistment and desertion of the prisoner. It is manifest that Kneisch went through the forms of enlistment and entrance into the public service; and while *de facto* a soldier, he is charged with desertion. By the twentieth article of war, desertion is made a high crime, punishable by a court martial; and the question presented by this branch of the case is, whether the due administration of justice should be retarded by the use of the writ of *habeas corpus*, and a person charged with crime and in custody on criminal process be permitted to arrest the proceedings, go behind the process, and show that he was incapable in law of committing the offence charged upon him—to wit, that his enlistment was voidable.

I think that only one true answer can be given to the proposition. Mutiny is made a crime by the seventh article of war; but could it be gravely insisted that a soldier who entered the ranks of the army, and had excited, caused, or joined in a mutiny, which had resulted in the serious disorganization of the troops or company, would, when under arrest and before trial by court martial, on application of one having a right to his services or custody, through an interposition of the writ of *habeas corpus*, delay and perhaps prevent a trial for the offence by showing that there was a defect in his enlistment?

The statement of the proposition suggests the only safe answer. The return of Colonel Zulich shows that the person is in custody for a crime, by an arrest through competent authority, and he is

authorized to continue him as a prisoner, to be dealt with according to law.

State v. Campbell, 53 Minn. 354; Mitchell v. Tibbetts, 17 Pick. 298; U. S. v. Logan, 45 Fed. Rep. 872; *In re* Neagle, 135 U. S. 1; State v. Adams, 4 Blackford 146; State v. Pike, 15 N. H. 83; Davison v. Champlin, 7 Conn. 244; *Ex parte* Crow Dog, 109 U. S. 556; U. S. v. Clarke, 31 Fed. R. 710; U. S. v. Thomas, 151 U. S. 577; Bishop I., Sec. 156; May, Sec. 82.

b.

Concurrent Jurisdiction.

The crime may be of such a nature that it is an offence both under the State and United States laws, for instance, treason or counterfeiting; for such crimes indictments are maintainable by the State courts, while proceedings will also lie under the United States statutes.

MARTIN v. STATE.

Court of Appeals of Texas, 1885.

18 Tex. App. 224.

APPELLANT was indicted and convicted for counterfeiting a silver dollar of the current coin of the United States. No statement of the evidence appears in the record. The only contested question seems to have been that of jurisdiction, which is sufficiently indicated in the opinion of this court.

As the punishment of appellant, the jury assessed a term of five years in the penitentiary.

WILSON, JUDGE. It is submitted by counsel for appellant that the power to coin money is a power expressly conferred upon the Federal government, and denied to the States. And that the power to punish for counterfeiting coin is an express power to the Federal government, and a power denied to the States; and that therefore the appellant could not legally be prosecuted and

convicted in the courts of this State for the offence of counterfeiting,—the State courts not having jurisdiction of said offence.

This position is not sound. Mr. Bishop says: "There are wrongful acts of a nature to violate duties both to the United States and a particular State. And some of these acts are declared crimes by the positive laws of each. It is probably the doctrine of the courts, though not free from doubt in principle, that, whenever Congress has the constitutional power to render a thing punishable as a crime against the United States, she can make this legislation exclusive of State law. But, however this may be, if the national statute neither in terms nor by necessary implication excludes the State law, the latter is not superseded. Therefore indictments are maintainable in the State courts for the offence against the State of counterfeiting the coin or bills of the United States, or foreign coin made current by act of Congress; while proceedings will also lie, under United States statutes, before the national tribunals, for doing the same thing as an offence against the United States. Congress has not attempted to restrict the power of the States." (1 Bish. Cr. Law, Sec. 178. See, also, Secs. 155, 984, 987, 989; *Fox v. Ohio*, 5 How. (U. S.), 410; *State v. McPherson*, 9 Iowa, 53; *Sizemore v. The State*, 3 Head, 26; 2 Bish. Cr. Law, Secs. 283, 285, 287.)

Our Code creates and defines the offence of counterfeiting, and it is, therefore, an offence against the laws of the State, and the courts of the State have jurisdiction to try, and to punish parties guilty thereof. The court, therefore, did not err in overruling the defendant's plea to its jurisdiction.

There is no statement of facts in the record. The indictment is in all respects a good one; the charge of the court is in conformity with the indictment and the law. There is no error in the conviction and it is affirmed.

State v. McPherson, 9 Ia. 53; *Jett v. Com.*, 18 Grat. 953; *People v. White*, 34 Cal. 183; *Com. v. Fuller*, 8 Met. 313; *Com. v. Barry*, 116 Mass. 1; *Harlan v. People*, 1 Doug. (Mich.) 207; *Moore v. People*, 14 How. 13; *May*, Sec. 83; *Bishop I.*, Sec. 178; *Wharton*, Sec. 264 *et seq.*; *Hawley & McGregor*, p. 55.

E.

SPECIFIC CRIMES.

When the law, either common or statutory, forbids a certain union of intent and act, and affixes a penalty thereto, it establishes a specific crime.

1. CRIMES AGAINST THE GOVERNMENT.

a.

Treason.

Treason is a breach of the allegiance owed by a subject to the government. In the United States it consists in levying war against the United States, a State, or adhering to their enemies, giving them aid and comfort.

UNITED STATES v. GREATHOUSE.

Circuit Court of the United States, 1863.

2 Abb. (U. S. C. C.), 364.

(See page 185 for this case.)

Const. U. S., Art. 3, Sec. 3; U. S. v. Hoxie, 1 Paine 265; U. S. v. Mitchell, 2 Dall. 348; U. S. v. Insurgents, 2 Dall. 335; *Ex parte* Ballman, 4 Cranch 75; U. S. v. Aaron Burr, 4 Cranch 460; Minn. Stat. 1894, Sec. 6318; N. Y. Penal Code, 37-40; Clark, p. 32, 351; Bishop L., Secs. 611-613; May, Sec. 124; Wharton, Sec. 1782.

NOTE.—Petit treason was the murder of a superior by an inferior, as a husband by his wife, a master by his servant. It was never recognized in this country, and is now abolished in England.

State v. Bilansky, 3 Minn. 246; Bish. Cr. Law, 611; Clark, p. 32; May, Sec. 134; Bishop I., Sec. 611; Hawley & McGregor, 115.

Levying war:

NOTE.—It is not sufficient to merely conspire to levy war; there must be an overt act; but those in league with those assembling are guilty.

N. Y. Penal Code, Sec. 39; Minn. Stat. 1894, Sec. 6322; Clark, p. 352; Wharton, Sec. 1793; Hawley & McGregor, 116.

NOTE.—Conviction for treason can only be had upon testimony of two lawful witnesses to the same overt act of treason, or by confession in open court.

U. S. Const., Art. 3, Sec. 3; Clark, p. 353; Wharton, Sec. 1808; Hawley & McGregor, 118.

NOTE.—Misprision of treason. This is the crime of concealing a treason; or, knowing of the commission of treason, failing to disclose the same as soon as may be.

Rev. St. U. S., Sec. 5333; Minn. Stat. 1894, Sec. 6320; Bishop I., 456, 716; Clark, p. 351; Wharton, Sec. 1784; Hawley & McGregor, p. 117.

b.

Crimes against the Elective Franchise.

Illegal voting is a crime at common law, by United States, and State statutes.

Minn. Stat. 1894, Sec. 21, 22, 35, 76, 85, 95, 103, 108, 110, 113, 122, 160, 161, 165, 6788, 201; N. Y. Penal Code, Sec. 41; State v. Welsch, 21 Minn. 22; State v. Davis, 22 Minn. 423; Clark, p. 354; Bish. I., Sec. 471; Wharton, Sec. 1832 a; Hawley & McGregor, p. 27.

c.

Bribery.

Bribery is the giving or receiving of a reward to influence any official act in either executive, legislative or judicial department of the government. The gist of the offence is the tendency of the bribe to pervert justice.

STATE v. ELLIS.

Supreme Court of New Jersey, 1868.

33 N. J. L. 102.

THE opinion of the court was delivered by

DALRIMPLE, J. The indictment in this case was removed into this court by *certiorari* to the Sessions of Hudson. It sets forth in substance, in language sufficiently plain and intelligible, that application having been duly made to the common council of Jersey City for leave to lay a railroad track along one of the public streets of that city, the defendant wickedly and corruptly offered to one of the members of said common council the sum of fifty dollars to vote in favor of said application. Upon return of the *certiorari*, a motion was made to quash the indictment, on the ground that the facts set forth do not constitute a crime.

It is said that the common law offence of bribery can only be predicated of a reward given to a judge or other official concerned in the administration of justice. The earlier text writers thus define the offence: "Where any man in judicial place takes any fee or pension, robe or livery, gift, reward or brocage, of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and drink, and that of small value." 3 Inst. 145. The definition in 4 Blackstone's Com. 139, is to the same effect. Hawkins, in his Pleas of the Crown, vol. 1, p. 312, gives, substantially, the same description of the offence, but adds: "Also, bribery signifies

the taking or giving of a reward for offices of a public nature." The later commentators, supported, as I think, by the adjudged cases, however, maintain the broader doctrine, that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration, is an indictable common law misdemeanor. 3 Greenleaf's Ev., Sec. 71; Bishop on Criminal Law, vol. 1, sec. 95, and notes; 1 Russell on Crimes 156. The case of *Rex v. Vaughan*, 4 Burr. 2494, arose upon motion for an information for a misdemeanor against the defendant, for offering money to the Duke of Grafton, First Lord of the Treasury, to procure the defendant's appointment by the crown to an office. Lord Mansfield, in his opinion in that case, says: "If these transactions are believed to be frequent, it is time to put a stop to them. A minister, trusted by the king to recommend fit persons to offices, would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation." The motion was granted. In the case of *Rex v. Plympton*, 2 Lord Raymond 1377, the court held that it was an offence to bribe persons to vote at elections of members of a corporation. Many other cases might be cited in support of the general proposition laid down by the later text writers above referred to. The cases will, however, all be found collated in 2d Bishop's Criminal Law, in the notes to Sec. 76 and 77. Indeed, the authorities seem to be all one way. Neither upon principle nor authority can the crime of bribery be confined to acts done to corrupt officers concerned in the administration of justice. If in the case now before us, it was no crime for the defendant to offer, it would have been no crime for the councilman to accept the bribe. The result would, therefore, be that votes of members of council on all questions coming before them, could be bought and sold like merchandise in the market. The law is otherwise. The common law offence of bribery is indictable and punishable in this State. Our statutes against bribery merely define and fix the punishment for the offence, in cases of bribery of judicial officers and members of the legislature; they do not repeal or abrogate, or otherwise alter the common law.

It is contended, in the next place, that the facts set forth in the indictment constitute no offence, inasmuch as the common

council had not jurisdiction to grant the application for which the vote was sought to be bought. In my opinion, it is entirely immaterial whether council had or had not jurisdiction over the subject matter of the application. If the application was, in point of fact, made, an attempt to procure votes for it by bribery was criminal. The offence is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote, if procured, would have produced the desired result, nor that the official, or the body of which he was a member, had authority by law to do the thing sought to be accomplished. Suppose an application made to a justice of the peace, in the court for the trial of small causes, for a summons in case of replevin, for slander, assault and battery, or trespass, wherein title to lands is involved: over these actions a justice of the peace has no jurisdiction, and any judgment he might render therein, would be *coram non judice* and void; yet, I think, it can hardly be contended, that a justice thus applied to may be offered, and with impunity accept a reward, to issue a summons in any case without his jurisdiction. If the common council of Jersey City had not authority to grant the application referred to, the act of the defendant in endeavoring to procure the grant asked for was only the more criminal, because he sought, by the corrupt use of money, to purchase from council an easement which they had no authority to grant. He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them. The gist of the offence is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. 2 Bishop's Criminal Law, Sec. 96. Would it not be a plain perversion of justice, to buy the votes of councilmen in favor of a surrender of the streets of the city, for the purposes of a railroad, when such surrender is unauthorized by law? The rights of the citizens of the municipality thus corruptly tampered with and bargained away, might be regained after a long and expensive litigation, or in some other mode; nevertheless, bribery and corruption would have done, to some extent at least, their work, and the due course of justice have been disturbed. But I am not prepared to assent, as at present advised, to the proposition that the common council could not properly entertain the application.

They were asked by a chartered railroad company of this State, having its terminus in Jersey City, to consent that a railroad track might be laid along one of the public streets of that city. It is not pretended that any legislative authority to lay such track had been obtained. The railroad company could not, under these circumstances, lawfully appropriate to its use one of the public streets of the city without the consent of the city, which has full control over all public streets within the city limits. Laws of 1851, p. 406, sec. 6.

Whether or not the common council has the power, with or without legislative sanction, to grant the use of a public street to a railroad company for the uses of the railroad, it is, I think, clear that no such use can be made of the streets, without the consent of the city, in the absence of a legislative grant to that effect.

Nor is it material whether the railroad company which applied for the privilege, had the power under its charter to lay the track. Application had been duly made for that purpose, and was pending. An attempt to bribe a member of council to vote upon it, whether such attempt was made after or before the introduction of an ordinance or resolution granting the privilege asked, comes within the general law against bribery. Whether the common council had authority to make the grant, or the railroad company the power to avail itself of its benefits, if made, or whether the offer of a bribe was before or after the application in due course of proceeding, had been embodied in an ordinance or resolution, is immaterial. The offer of anything of value in corrupt payment or reward for any official act, legislative, executive, or judicial, to be done, is an indictable offence at the common law.

The objections taken are not tenable, and the motion to quash must be denied.

Motion denied.

Walsch v. People, 65 Ill. 58; *Hutchinson v. State*, 36 Tex. 293; *State v. Jackson*, 73 Me. 91; *State v. Purdy*, 36 Wis. 213; *Dishon v. Smith*, 10 Ia. 212; *People v. Northey*, 77 Cal. 618; *Glover v. State*, 109 Ind. 391; *People v. Markham*, 64 Cal. 159; Minn. Stat. 1894, 6326, 6327, 6333, 6334, 6348,

6349, 6351, 6355; N. Y. Penal Code, Sec. 44, 481; 2 Bish. Cr. Law, 85; 4 Bl. Com. * page 139 (Lewis's Edition); Clark, p. 335; Wharton, Sec. 1857; Hawley & McGregor, p. 258.

d.

Crimes by and against the Executive Power.

Such acts as entering upon a public office without having qualified; asking or receiving bribes, taking unlawful fees, intrusion into public office, etc., are crimes against the executive power, and provided for by statutory enactment.

State v. Brown, 12 Minn. 490; Minn. Stat. 1894, Sec. 6325-6338; N. Y. Penal Code, Sec. 42-58.

e.

Crimes against the Legislative Power.

Such acts as disturbing legislatures while in session, intimidating members, altering drafts or engrossed copies of bills, bribing members and refusing to appear and testify before committees, etc., are crimes against the legislative power and are provided for by legislative enactment.

Minn. Stat. 1894, Sec. 6339-6347; N. Y. Penal Code, Sec. 59-70.

2. CRIMES AGAINST PUBLIC JUSTICE.

a.

Bribery.

Any act thwarting or perverting public justice, which is taken cognizance of by the code, is a crime; the bribery of judicial officers being one of the most flagrant crimes of this class.

STATE *v.* MILES.

Supreme Judicial Court of Maine. 1896.

36 Atlantic, 70.

FOSTER, J. This is an indictment at common law for bribery, and comes before this court on demurrer.

There are five counts in the indictment, and in each the respondent is alleged to have been a public officer of the city of Portland, and, under color of his office, to have unlawfully, unjustly, and extorsively received bribes for neglecting and violating his official duties.

The demurrer being general, and aimed at the indictment as a whole, if any one of the five counts is sufficient in law, the demurrer cannot be sustained. Any one of the counts, if good, would be sufficient upon which to found a verdict, even though there may have been other counts in the same indictment that were defective. *State v. Burke*, 38 Me. 574; *State v. Mayberry*, 48 Me. 218; *Bank v. Copeland*, 72 Me. 220; *Com. v. Hawkins*, 3 Gray, 463.

Bribery at common law is the crime of offering any undue reward or remuneration to any public officer or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty.

The taking as well as the offering or receiving of such reward

constitutes the crime, when done with a corrupt intent. *State v. Ellis*, 33 N. J. Law, 102, 97 Am. Dec. 707, and note.

In the case at bar the corrupt acceptance of the bribe is the gist of the offence, and this is sufficiently alleged. It matters not whether he actually carries out the corrupt agreement.

Thus, in the case of *People v. Markham*, 64 Cal. 157, 30 Pac. 620, it was held that a police officer, who received money in consideration of his promise not to arrest certain offenders, was guilty of bribery, and it was not necessary to allege or prove that the crime was subsequently committed, and that the officer failed to make the arrest.

It is claimed that this indictment does not set out the corrupt action of the respondent, for which the bribe constituted the inducement, by certain and definite allegations, and that the words "for not arresting," and kindred expressions in the several counts, do not amount to allegation, but leave the corrupt motive of the respondent to inference rather than averment. It is true that, in indictments, the want of a direct and positive allegation, in the description of the substance, nature, or manner of the offence, cannot be supplied by any intendment, argument, or implication, and that the charge must be laid positively, and not by way of recital merely. *State v. Paul*, 69 Me. 215. But in this case we think the indictment is not defective in the respect claimed. It is distinctly and affirmatively alleged that the bribes were received, and the alleged inducement or purpose for which these bribes were received is stated in the proposition clauses commencing with the words "for not arresting," etc. We think this is sufficient. The meaning is clear. The substantive part of the offence, accepting the bribes, is affirmatively alleged, and the purpose, object, or inducement is sufficiently set forth to meet the requirements of criminal pleading. It is as strongly asserted as it would be had the indictment stated that the money was accepted as a bribe to induce the respondent to refrain from doing an act which it was his official duty to perform.

It cannot be said that the allegations, as contained in the indictment, may all be true, and yet no offence committed, as in *State v. Godfrey*, 24 Me. 232.

The allegation in reference to the lottery, scheme, or device of chance, mentioned in the first and second counts, in which the

party to be arrested was concerned, is sufficient. The corrupt acceptance of a bribe by the respondent is the gist of this prosecution, rather than the facts necessary to be alleged for being unlawfully concerned in a lottery. *State v. Lang*, 63 Me. 215, 219, 220.

The same reasoning applies to the remaining counts, and the demurrer was properly overruled.

Exceptions overruled.

Minn. Stat. 1894, Sec. 6348-6357; N. Y. Penal Code, Secs. 71-167; Wharton, Sec. 3117.

b.

Perjury.

Perjury is the willful and false giving of material testimony under a *legally administered* oath in a *judicial proceeding*; or in a case where an oath is *required by statute*.

MILLER v. FLORIDA.

Supreme Court of Florida, 1876.

15 Fla. 577.

ON November 24, 1875, John Miller, the plaintiff in error, was duly arraigned and tried in the Circuit Court of the Third Judicial District, held in and for Madison county, on an indictment for perjury.

The indictment charged that on the 20th day of October, 1874, at a Circuit Court held at the court-house in the county of Madison, one Jerry Grimes was being tried upon an indictment for feloniously procuring a felony to be committed by one Isaiah Phillips, charged with the crime of forgery. That this John Miller was called and appeared as a juror; that he was challenged and sworn by the judge touching his qualifications as such juror. That it became a material question and subject of inquiry whether the said John Miller was related to the accused,

Jerry Grimes. That the said John Miller, intending to deceive the said court, unlawfully, falsely, knowingly, willfully and corruptly, did swear that he was not related to the said Jerry Grimes, when, in fact, at that time, he was the father-in-law of the said Jerry Grimes. That he so swore for the purpose of causing the said Jerry Grimes to be wrongfully acquitted on the said indictment, and for no other purpose whatever. That said John Miller knowingly, willfully and corruptly did commit willful and corrupt perjury.

On the trial of the cause, the counsel for the accused took certain exceptions to the rulings of the court, which, having been duly settled and signed by the Circuit Judge, appear in the return to the writ of error in the following words:

I. On the trial of the case, after the State had rested the defendant, the party accused, claimed and insisted upon the right of making a statement to the jury, under oath, of the matter of his defence. Whereupon, the court refused to allow him to do so, unless he was put up as a witness, subject to cross-examination.

To which ruling of the court the said accused excepted.

II. The court, among other things, charged the jury that if they believed from the testimony that the accused took the oath, and that it was false, the accused was guilty.

To which the accused excepted on the ground that the court should have charged that, if the accused took the oath, and it was knowingly, willfully and corruptly false, they might find a verdict of guilty.

III. The accused offered to make a statement of the matter of his defence, on oath, before the jury, which defence was (in substance) as stated to the court: "That it was true that Jerry Grimes married the daughter of the accused, but that soon after their marriage said Grimes ill-treated his daughter and abandoned her. That he had for several years been compelled to support his daughter and child. That Jerry Grimes had gone off, and he did not consider he was anything to him or his family. That when the accused was asked on his *voir dire* whether or not he was related to the prisoner at the bar, Jerry Grimes, he answered he was not, being at the time of the taking the said oath under the *bona fide* impression and conviction that, as he, the said Jerry Grimes, had left his wife, etc., as aforesaid, he

really was not related to the accused, Jerry Grimes. That he made oath to what he ignorantly supposed to be true, and thus that he did not willfully and corruptly make said oath."

The court refused to allow the accused to make such a defence, either as a statement or otherwise, on the ground, as the court said, of its irrelevancy, and that if the same was true it would be no defence, as ignorance of law was no excuse.

To which the accused excepted.

The jury found the prisoner guilty of perjury. The counsel for the accused moved for a new trial upon the errors so alleged, and also upon the further grounds that the verdict of the jury was contrary to law, and because the jury was misled by the charge of the court.

The motion for new trial was denied, and the court proceeded to sentence the prisoner to State prison for the term of ten years.

The accused brings the cause into this court by writ of error.

VAN VALKENBURGH, J., delivered the opinion of the court.

On the trial of this case, and after the State had rested, the counsel for the accused offered the statement of the prisoner, under oath, as to the matter of his defence, which the court refused to allow, unless he was put upon the stand as a witness, subject to cross-examination.

The statute of 1865, Chapter 1472, Section 4, provides that "in all criminal prosecutions, the party accused shall have the right of making a statement of the matters of his or her defence, under oath, before the jury, when, in the opinion of the court, the ends of justice shall so require."

Under this act, it was in the discretion of the court to permit the accused to make such a statement, depending entirely upon the question as to whether the "ends of justice shall so require."

The making of such a statement under oath does not necessarily constitute the accused a witness, nor does it subject him to the rules applicable to witnesses making him liable to cross-examination. It is simply a presentation verbally, in his own language and manner, of the matters pertaining to his defence, of such facts and circumstances surrounding the case as will go to excuse the offence and negative the idea of willful or corrupt intent. It is for the jury alone, and is to be taken into considera-

tion by them, in connection with all of the evidence in the case, and to be allowed such weight, and such only, as they, in their judgment, may see fit to give it.

In the case of *Barber v. The State* (13 Fla. 681), where the error alleged was, that "the court charged the jury that the statement of the defendant is not evidence, and that they could not take such statement into consideration as evidence," the court says: "There was some purpose to be subserved more than the mere amusement of the jury in allowing the statement to be made. It is the jury alone who are entitled to consider the statement, and if it be remarked upon at all, it should be to suggest to the jury, in effect, that they are to attach to it such importance, in view of the nature of the offence charged, and of the testimony before them, as in their good judgment it is entitled to. It is for their consideration alone, and they may disregard it entirely." And again: "The defendant is entitled, when permitted to make the statement, to the benefit or disadvantage of such impression as he may be able to make upon the judgment of the jury."

This statute, however, of 1865, was repealed by Chapter 1816 of the laws of 1870. This is an act entitled "An act concerning testimony," embodied in a single section, and reads as follows: "In the courts of Florida, there shall be no exclusion of any witness in a civil action because he is a party to or interested in the issue tried. In all the criminal prosecutions, the party accused shall have the right of making a statement to the jury, under oath, of the matter of his or her defence."

This takes from the court the discretion allowed by the statute of 1865, and the unqualified right of the accused to make such a statement, under oath, to the jury, is established by law.

Had it been the intention of the legislature to provide that the accused should make himself a witness, subject to the rules controlling in the examination of witnesses, there would have been no necessity for the second paragraph in the section where this provision is found. A slight change of the first portion of the section would have covered every case of civil action or criminal prosecution.

The second ground of error is: "The court, among other things, charged the jury that if they believed, from the testi-

mony, that the accused took the oath, and that it was false, the accused was guilty."

Perjury is defined in the elementary books to be the taking of a willfully false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely, in a matter material to the point in question, whether he be believed or not. Our statute, in accordance with this definition of perjury, in an "act to provide for the punishment of crime and proceedings in criminal cases," passed in 1868, says: "Whoever, being authorized or required by law to take an oath or affirmation, willfully swears or affirms, falsely, in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury," etc.

It will be seen that both at common law and by statute in this State, the rule is the same, or, in other words, that the common law definition of the crime of perjury is made a portion of the statutes, and that the oath must not only be false, but that it must be willfully false, and to matter material to the issue. It is necessary so to charge the offence in the indictment, or there is no crime alleged. An oath may be false, and still not willfully false, so as to constitute the crime of perjury. 2 Bishop Crim. Law, Sec. 1046. See, also, *Commonwealth v. Brady*, 5 Gray, 78.

It may also be to an immaterial matter or thing, one not material to the issue, in which case it could not be held as a willful false oath. 1 Hawkins P. C., C. 27, page 431.

In some cases, where a false oath has been taken, the party was punished by indictment at common law for a misdemeanor, though the offence did not amount to perjury. 2 Russell on Crimes, 603; 2 Bishop C. L., Sec. 1014.

It is said "the false oath must be willful and taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable." 1 Hawkins, P. C., C. 27, Sec. 2; 2 Russell on Crimes, 597.

A false oath, taken by inadvertence or mistake, cannot amount to voluntary and corrupt perjury. 2 Wharton C. L., Sec. 2199.

On the other hand, it has been held that a man may be guilty of perjury if he swears to a particular fact without, at the time, knowing whether it be true or false. It is no defence that the oath so taken is true, if the party swears to it willfully and corruptly, and has no probable ground for the oath. 1 Hawkins P. C., C. 27, page 433; *People v. McKenney*, 3 Parker C. R. 510.

It will thus be seen that there is a difference between a willful false oath, constituting the crime of perjury, and a false oath which, at common law, might be punished as a misdemeanor. The one is stubborn and corrupt, while the other is simply not true, lacking the elements which go to constitute the crime of perjury as defined by our statute. The jury must find that the accused was guilty of taking a willfully false oath, and in relation to matter material to the issue, in order to convict him of the crime of perjury and to render him liable to the punishment prescribed for that offence, and to this end the court should have so charged them.

The third ground of error assigned is similar to and embraced in the first, that the court refused to permit the accused to make his statement of the matters of his defence, on oath, before the jury. The accused, at the same time of making such offer, stated to the court the substance of the statement so proposed to be made. The court refused to grant the request upon the ground of irrelevancy, and said that if the facts so proposed to be stated to the jury were true, it was no defence. This point has been disposed of under the first above assignment of error, where we hold that the accused, under the statute, has a right to make a statement of the matter of his defence, on oath, before the jury. We cannot see how such a statement as is offered by the accused would be irrelevant. It related, certainly, to the matter of his defence; to the question, which the jury must determine, of the intent. Was the oath alleged to have been taken by the accused willfully false? or was it taken through inadvertence, and not with a corrupt motive? It would go for what it was worth, and while it might not strictly be a defence to the prosecution, yet the accused had a right to its consideration by the jury, whose judgment might have been influenced in his favor by it. "It

would give to the jury for their consideration the facts upon which his oath was based, and the reasons operating upon his mind, and, from those facts and reasons they might determine the motives, if any, influencing him. We think it should have been admitted by the court.

The judgment must be reversed and a new trial awarded.

Com. v. Brady, 5 Gray 78; *U. S. v. Babcock*, 4 McLean 113; *Alexander v. State*, 3 Dev. 470; *Cothran v. State*, 39 Miss. 541; *Carpenter v. State*, 4 How. (Miss.) 163; *State v. Higgins*, 124 Mo. 640; *Nelson v. State*, 32 Ark. 192; *People v. Dishler*, 38 Hun. 175; *U. S. v. Stanley*, 6 McLean 409; *State v. McKinney*, 42 Ia. 205; *State v. Wakefield*, 73 Mo. 554; *Com. v. Smith*, 11 Allen 243; *State v. Hawkins*, 20 S. E. 623; *Misener v. State*, 31 S. W. 858; *Craven v. State*, 28 S. W. 472; *Weaver v. State*, 31 S. W. 400; *Johnson v. State*, 31 S. W. 397; *Com. v. Knight*, 12 Mass. 274; *White v. State*, 9 Miss. 149; *Martin v. Miller*, 4 Mo. 47; *State v. Ammons*, 3 Murph. 123; *State v. Dodd*, 3 Murph. 226; *State v. Chandler*, 42 Vt. 446; *Henderson v. State*, 117 Ill. 265; *Pollard v. State*, 69 Ill. 148; N. Y. Penal Code, Sec. 96-113; Minn. Stat. 1894, Sec. 6371-6378; Clark, p. 330; Bish. I., Sec. 468; Wharton, Sec. 1245; Hawley & McGregor, p. 245; The Penal Code of Pa.; Shields, vol. I., 191.

Proceeding must be judicial: *Chapman v. Gillet*, 2 Conn. 40; *Arden v. State*, 11 Conn. 408; *State v. Stephenson*, 4 McCord 165; *Mahan v. Perry*, 5 Mo. 21; *State v. Warden*, 11 Metc. 406; *State v. Lamden*, 5 Humph. 83; *State v. Alexander*, 4 Hawks. 182; *State v. Wyatt*, 2 Hayw. 56; *State v. Keene*, 26 Me. 33; *State v. McCroskey*, 3 McCord 308; *State v. Chamberlain*, 30 Vt. 559; Clark, p. 331; Bishop I., Sec. 468; Wharton, Sec. 1292; Hawley & McGregor, p. 248.

Required by statute: *Silver v. State*, 17 Ohio 365; *State v. McCarthy*, 41 Minn. 59; *State v. Cannon*, 79 Mo. 343; *State v. Whittemore*, 50 N. H. 245; *State v. Rump*, 30 Pa. 475; *U. S. v. Kendrick*, 2 Mason 69; *U. S. v. Babcock*, 4 McLean 113; *Warwick v. State*, 25 Ohio St. 21; *State v. Foulks*, 57 Mo. 461; *State v. Belew*, 79 Mo. 584.

Legally administered: *State v. McCroskey*, 3 McCord 308; *State v. Furlong*, 26 Me. 69; *State v. Knight*, 12 Mass. 274; *State v. Fasset*, 16 Conn. 457; *Arden v. State*, 11 Conn. 408; *Conner v. Commonwealth*, 2 Va. Cas. 30; *State v. Pankey*, 1 Scam. 80; *State v. Lamden*, 5 Humph. 83; *Steinson v. State*, 6 Yerg. 530; *State v. Crumb*, 68 Mo. 206; *State v. Wymberly*, 40 La. Ann. 460; *Maynard v. People*, 135 Ill. 416; *State v. Wilson*, 87 Tenn. 693; *State v. Van Dusen*, 78 Ill. 645; Wharton, Sec. 1251.

NOTE.—Subornation of perjury is the procuring of perjured testimony.

Com. v. Douglass, 5 Metc. (Mass.) 241; *Stewart v. State*, 22 Ohio St. 477; *People v. Ross*, 103 Cal. 425; Minn. Stat. 1894, Sec. 6379-6380.

NOTE c.—Forging, stealing, falsifying public records, are made criminal acts by statute.

Minn. Stat. 1894, Secs. 6369-6370; Clark, p. 330; Bish. I., Sec. 468; Wharton, Sec. 1329; Hawley & McGregor, p. 251.

NOTE.—Falsifying any evidence is made a felony, and destroying any evidence a misdemeanor, by statute.

Minn. Stat. 1894, Secs. 6381-6383; N. Y. Penal Code, Secs. 107-113.

NOTE d.—Rescue. Rescue is the deliverance of a person from lawful custody by any third person, and is a felony or misdemeanor, according to the crime with which the prisoner is charged.

People v. Tompkins, 9 Johns. 70; 4 Bl. Com. 131; N. Y. Code, Secs. 82-83; Minn. Stat. 1894, Secs. 6358-6359; Clark, p. 327; Bish. I., Sec. 466 (1); Wharton, Sec. 1680; Hawley & McGregor, p. 263.

NOTE e.—Escapes. (1) By an officer or other person voluntarily or negligently permitting a prisoner to escape from lawful custody. (2) By a prisoner where he, without breaking prison, escapes from lawful custody. By some statutes such prisoner is guilty of a misdemeanor, if held for a misdemeanor, and a felony, if held for felony.

N. Y. Penal Code, Secs. 30, 84, 89; Minn. Stat. 1894, Sec. 6361; Clark, p. 326; Bish. I., Sec. 466 (2); Wharton, Sec. 1667.

NOTE.—By some statutes an attempt to escape from states prison is a felony.

Minn. Stat. 1894, Sec. 6362.

NOTE.—By some statutes a person who assists a prisoner to escape from lawful custody is guilty of a misdemeanor if the prisoner is held for misdemeanor, and felony if held for felony.

Minn. Stat. 1894, Sec. 6363.

NOTE.—An officer permitting such an escape, if willfully or corruptly done, is guilty of a felony, in any other case of a misdemeanor.

Minn. Stat. 1894, Sec. 6365; Wharton, Sec. 1667.

NOTE f.—Prison breach. Prison breach is the breaking and exit of a prisoner from lawful confinement. If confined for a felony, the prison breach is a felony; if for a misdemeanor, it is a misdemeanor.

Minn. Stat. 1894, Sec. 6361; State v. Leach, 7 Conn. 452; Com. v. Filburn, 119 Mass. 297; Oleson v. State, 20 Wis. 62; Bish. I., Sec. 466 (2); Clark, p. 327; Wharton, Sec. 1672; Hawley & McGregor, p. 262.

NOTE.—Some statutes made those aiding in such prison breach a felony if the prisoner is confined for a felony, and a misdemeanor if confined for a misdemeanor.

Minn. Stat. 1894, Sec. 6363; Clark, p. 329; Bish. I., Sec. 697; Wharton, Sec. 1677; Hawley & McGregor, p. 261.

NOTE.—An officer, if he aids willfully such a prison breach, is guilty of a felony. If it is accomplished merely through the negligence of the officer, he is guilty of a misdemeanor.

Minn. Stat. 1894, Sec. 6365; Clark, p. 327; Hawley & McGregor, p. 262.

3. CRIMES AGAINST THE PERSON.

Crimes against the person are such acts as are injurious to the personal security of individuals, which are taken cognizance of by the common law or the statutes.

a.

Homicide.

Homicide is the killing of a human being and is justifiable, excusable or felonious.

Minn. Stat. 1894, Sec. 6433; May, Cr. Law, 218; Clark, p. 127; N. Y. Penal Code, Secs. 179-180; May, Sec. 218; Wharton, Sec. 303 *et seq.*; Hawley & McGregor, p. 119; The Penal Code of Pa.; Shields, vol. I., 227.

(1) *Elements.*

(a) Human Being.

The victim must be a human being, a person *in esse* at the time of the killing.

STATE *v.* WINTHROP.

Supreme Court of Iowa, 1876.

43 Ia. 519.

ADAMS, J. The defendant is a physician, and was employed by one Roxia Clayton to attend her in childbirth. The child died. The defendant is charged with having produced its death. Evidence was introduced by the State tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instruction:

"To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not."

The court refused to give this instruction, and gave the following:

"If the child is fully delivered from the body of the mother, while the after birth is not, and the two are connected by the umbilical cord, and the child has independent life, no matter whether it has breathed or not, or an independent circulation has been established or not, it is a human being, on which the crime of murder may be perpetrated."

The giving of this instruction, and the refusal to instruct as asked, are assigned as error.

The court below seems to have assumed that a child may have independent life, without respiration and independent circulation. The idea of the court seems to have been that the life which the child lives between the time of its birth and the time of the establishment of respiration and independent circulation is an independent life. Yet the position taken by the attorney-general, in his argument in behalf of the State, is fundamentally different. He says: "It will probably not be contended that independent life can exist without independent circulation, and hence the existence of the former necessarily presumes the existence of the latter, and so other or further proof is unnecessary." He further says: "The instruction complained of amounts to nothing more than the statement that, if the child had an independent life, then it was not necessary to establish those facts upon which the existence of life necessarily depends." If such was the meaning of the court below, the language used to express it was very unfortunate. The court said that, if the child had independent life, it is no matter whether an independent circulation had been established or not. The attorney-general says that if the child had independent life, it had independent circulation, of course. But whether we take the one view or the other, we

think the instruction was wrong. We will consider first the view that independent life and independent circulation necessarily co-exist, and examine the instruction as if that were conceded.

It follows that where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that; it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the attorney-general's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, consisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child have an independent life, while its circulation is still dependent upon the mother? There are two senses in which the word independence may be used. There is actual independence, and there is potential independence. A child is actually independent of its father when it is earning its own living; it is potentially independent when it is capable of earning its own living. We think the court below used the word independent in the latter sense. While the blood of the child circulates through the *placenta*, it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother. Wharton & Stille's Medical Jurisprudence, 2 vol., sec. 128. It has no occasion during that period to breath through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of es-

tablishing independent respiration and independent circulation. Children, it seems, oftentimes do not breathe immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation, and the circulation was independent. Whether it had inappreciable respiration, or was in the condition of a person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true that after a child is born it can no longer be called a *fœtus*, according to the ordinary meaning of that word. Beck says, however, in his *Medical Juris.*, 1 vol., 498: "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *fœtus in utero*. It lives merely because the *foetal* circulation is still going on. In this case none of the organs undergo any change." Casper says, in his *Forensic Medicine*, 3 vol., 33: "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent of the mother without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fœtal* life and the new life which succeeds upon the establishment of respiration and independent circulation.

If we turn from the treatises on Medical Jurisprudence to the reported decisions, we find this difference, which is so empha-

sized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In *Rex v. Enoch*, 5 C. & P., 539, Mr. Justice J. Parke said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In *Regina v. Trilloe*, 1 Carrington & Marshman, 650, Erskine, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner willfully and of malice aforethought strangled the child, after it had been so produced, and while it was alive, and while it had an independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." See, also, *Greenleaf on Ev.*, 3 vol., sec. 136.

It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder.

The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

Reversed.

Regina v. Trolloe, 1 Car. & Marsh 650; *Wallace v. State*, 10 Tex. App. 255; *Rex v. Brain*, 6 Car. & P. 349; *Reg. v. Sellis*, 7 Car. & P. 850; *Reg. v. Reeves*, 9 Car. & P. 25; *Rex v. Enoch*, 5 Car. & P. 539; *Evans v. People*, 49 N. Y. 86; *Johnson v. State*, 24 S. W. 285; *Wharton*, Sec. 303; 2 *Bish. Cr. L.*, Secs. 630-635; *May*, 218-219; *Hawley & McGregor*, p. 119.

(b) Death.

(1¹) Corpus delicti.

The fact that a crime has been committed must be proved.

PEOPLE v. PALMER.

Court of Appeals of New York, 1888.

109 N. Y. 110; 16 N. E. 529.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, made September 13, 1887, which reversed a judgment of the Court of Oyer and Terminer of the county of Clinton, entered upon a verdict convicting the defendant of the crime of murder in the second degree and granting a new trial.

The defendant was indicted for the murder of one Peter Bernard. A dead body was found, alleged to be that of Bernard. There was no direct proof of that fact, and it was sought to be established by circumstances, among others, that articles were found on or near the body which resembled articles shown to have been the property of and in the possession of Bernard before he disappeared. One witness testified that he made for Bernard a boot taken from the foot of the dead body. A satchel was found near the body in which was an almanac, on which the name of "Bernard" was written. A witness identified it as Bernard's and testified that he had seen Bernard write, and thought the name was in his handwriting. Keys found on the body fitted the lock of the satchel. Various articles of clothing found on the body were also identified as belonging to Bernard. The body was in a decomposed and unrecognizable condition.

FINCH, J. The prisoner was convicted of murder in the second degree, and that conviction reversed by the General Term, because there was no direct evidence which identified the body

found as that of the person alleged to have been murdered. From that decision the People appeal.

The question is a very grave one; not merely to the prisoner, whose liberty may depend upon the issue, but to the People and the administration of public justice, for, if the law be as the General Term has declared it, a murderer may always escape, if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible; or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow that the tenderness of the Penal Code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body, and has put a premium upon and offered a reward for that species of atrocity. This result is said to have been accomplished by section 181, which prohibits a conviction, "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt." In the first clause of this provision, the endeavor to state and describe one fact has involved the statement of another, changing a simple into a compound fact, and making it possible to apply the requirement of direct proof to the two facts of death and of identity, rather than to the one fact of the death alone. That some one is dead is directly proved whenever a dead body is found. Its identity, as that of the person alleged to have been killed, is a further fact to be next established in the process of investigation. If it be the meaning of the Penal Code that both of these facts, identity as well as death, are to be proved by direct evidence, it establishes a new rule which never before prevailed, and of which no previous trace can anywhere be found. It has always been the rule, since the time of Lord Hale, that the *corpus delicti* should be proved by direct, or, at least, by certain and unequivocal evidence. But it never was the doctrine of the common law that, when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule.

By the *corpus delicti*, the body or substance of the offence, has

always been meant the existence of a criminal fact. Unless such a fact exists there is nothing to investigate. Until it is proved inquiry has no point upon which it can concentrate. Indeed, there is nothing to inquire about. But, when a criminal fact is discovered, its existence, for the purpose of a judicial investigation, must be established fully, completely, by the most clear and decisive evidence. For otherwise the after reasoning founded upon it and drawing its force from it will be dangerous, fallacious, and unreliable. As the weakness of the foundation is more and more intensified, while the superstructure ascends and the weight grows, so the circumstantial evidence built upon a criminal fact, not certain to have existed, becomes itself weak and indecisive, and more and more so as the suspicions expand and extend. If somebody has been murdered a motive for a murder becomes a significant fact, rendered more so when identification shows it a motive for the particular murder. But if the death is doubtful the probative force of a motive dwindles to mere suspicion. In the case of *Ruloff v. People* (18 N. Y. 179); the doctrine was both illustrated and applied. The death of the prisoner's infant child was not proved, but in its place was put the equivocal fact of a sudden and unexplained disappearance. The evidence might all be true and yet the child be living and not dead; and, if living, every circumstance relied upon became at once fallacious and deceptive. Such circumstances gain their probative force only upon condition that there is a criminal fact which they serve to explain.

But the *corpus delicti*, the existence of a criminal fact, may be completely established, and the need of direct proof satisfied, before the question of identity is reached. There may be direct proof of a murder, though no one knows the person of the victim. A dead body is found with the skull mashed in upon the brain, under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death and cogent and irresistible proof of the violence; the latter the cause and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding an investigation. These facts proved, the *corpus delicti* is established, although nobody, as yet, knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the vio-

lence remain the two inquiries to which the ascertained criminal fact gives rise; who is the slain and who the slayer; the identity of the one and the agency of the other. These may be established by circumstantial evidence which convinces the conscience of the jury, and because a basis has been furnished upon which inferences may stand and presumptions have strength.

That I have correctly stated what is meant by the *corpus delicti*, requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect, or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority.

Lord Stowell said, in *Evans v. Evans* (1 Hag. Con. 35, 105), "if you have a criminal fact ascertained, you may then take presumptive proof to show who did it—to fix the criminal—having then an actual *corpus delicti*." In *Rex v. Clewes* (4 C. & P. 221), the alleged murder was in 1806, and, in 1829 bones were found buried under a barn which the prisoner had occupied. The question submitted to the jury was, whether these bones were the remains of Hemmings, the person alleged to have been murdered. It was sought to identify the bones by a carpenter's rule and the remnant of a pair of shoes found near, and also by something remarkable about the teeth. No question of the competency of any of the evidence was at all suggested, but its sufficiency was criticised and finally left to the determination of the jury, which rendered a verdict of acquittal. In *Wills on Circumstantial Evidence* (p. 213), it is said that direct and positive proof of the identity of the deceased is not required, and the case of *Rex v. Cook* is cited, in which it appeared that a human body had been burned, but enough remained unconsumed to show that it was the body of a male adult, and its further identification was founded upon circumstances, an important part of which was the finding in the possession of the prisoner of numerous articles belonging to the deceased. In *Regina v. Hopkins* (8 C. & P. 591), the identity of the deceased with that of the child, alleged to have been murdered, failed, not only because of differences in the appearance of the body, but also from differences in the clothing, and the whole inquiry turned upon resemblances, or the want of them. In *Best on Presumptions* (vol. 2, p. 780), it is said that "every criminal charge involves

two things; first, that an offence has been committed; and, second, that the accused is the author, or one of the authors of it;" and, the learned writer adds: "The identification of the body of the deceased need not be proved by witnesses, who, by an actual inspection of the body, recognize it as the body of the person with whose murder the prisoner is charged; but it may be by the same class of proof as is used to identify the prisoner on trial, or any other material facts. * * * Indeed, it may be said that any proof that satisfies the jury that the body is that of the deceased is sufficient; as fragments of the clothing identified as similar to that worn by the deceased when last seen alive." Starkie (p. 575) defines the *corpus delicti* as "the fact that the crime has been actually perpetrated," and Greenleaf (vol. 3, sec. 131) as "the fact that a murder has been committed," and adds that the rule requires "unequivocal and certain proof that some one is dead." All these cases and authors hold, without exception, that until a criminal fact has been established, "*antequam de crimine constiterit*," there can be no basis for presumptive proof, but when, in a case of murder, that basis has been certainly supplied, the identity of the victim and the agency of the prisoner may be shown by circumstances.

So far as I have been able to discover, that rule has always been recognized and applied in this country. A few of the more remarkable cases may be studied to demonstrate its wide prevalence. In *People v. Wilson* (3 Park Cr. R. 199), it appeared that a dead body, with marks of violence upon it, had been washed ashore. It was alleged to have been the body of Captain Palmer for whose murder the prisoner was being tried. No direct evidence of that identity was or could be given. But the criminal fact of a death, by violence, having been fully established, the identity of the remains was proved by circumstances. Personal recognition had become impossible, and identity was established by an inference from resemblances. The height of the deceased was shown, an unusual length of face, and a widening of the end of the little finger, to which, in a general way, the body corresponded. But a more important fact was that the captain had imprinted his name upon his arm and leg, and in the same portions of the body found the skin had been cut away, except that on the leg the letter P remained visible. A brother-in-law of de-

ceased, who had seen the body, was asked the direct question, whose body it was; but the court would not permit an answer; saying that the question was not the ordinary one of personal identity, since the body had been submerged for five months, but was one of an inference from resemblances, which the jury and not the witness must draw. The prisoner was convicted. In *Comm. v. Webster* (5 Cush. 295), the identification stood mainly upon a block of teeth found in the furnace where part of the body was consumed. There was no direct recognition of the body by any one, but the circumstantial evidence was very strong. I do not see how the identification of the false teeth can be deemed direct evidence of the identity of the remains. It was a fact from which that identity could be inferred, and the inference be very strong, but the conclusion would still be an inference. If Dr. Keep, the dentist, after examining the teeth, had been asked the direct question whether the mutilated remains were those of the deceased, he could only have answered in the affirmative, as a judgment founded upon a process of reasoning. False teeth are artificial and not natural. They may be worn at one time and omitted at another. They may be lost from the mouth and pass into a stranger's possession. If their identity as found among the remains directly identified the body, why did not in the present case the proved identity of the boot found on the foot of the body discovered directly identify that body? Is not the difference rather one of the degree than of the kind of proof? But in both cases I think the evidence was inferential, and cannot justly be regarded as direct. In *Taylor v. The State* (35 Texas, 97), there was no direct proof of the identity of the deceased, but his clothing, hat and papers were identified, and his wagon and team and even his dog were found in the prisoner's possession. A still more remarkable case was that of *The State v. Williams* (7 Jones, 446), where with the bones were found some trifling articles of feminine attire, seemingly insufficient to justify an inference of identity.

In all the investigation to which the briefs of counsel have led the way, and which I have independently pursued, I have found no trace of authority for the doctrine said to be established by the Penal Code, save here and there some careless expression which seems to include the identity of the deceased in the

corpus delicti, and which plainly originated in a tacit assumption of that identity for the purposes of the idea sought to be conveyed.

We come now to the inquiry whether the rule of the common law has in fact been changed by the Penal Code, and we are to approach that inquiry with the presumption that no such change was intended unless the statute is explicit and clear in that direction. (1 Kent's Com. [3d ed.] p. 463; *White v. Wager*, 32 Barb. 250; affirmed 25 N. Y. 328.) I am persuaded that a careful analysis of the section referred to will show that no such change, so radical and dangerous, was either made or intended, and that the sole scope and purpose of the section was to declare in explicit terms the existing rule of the common law.

The language of that section contemplates two independent facts, not three nor four. It speaks of them as "each," and describes them as "the former" and "the latter." One is to be proved by direct evidence, the other beyond a reasonable doubt. This language is appropriate and precise, if by the one fact is meant the fact of the death of the person alleged to have been killed, however that identity may be shown, and assuming it to have been established; and by the other the guilty agency of the prisoner. But the language becomes quite inappropriate if the meaning is that two facts, the death of the deceased and his identity, are to be established by direct evidence. It is the one fact that is to be thus proved. When the person supposed or alleged to be dead is identified, the fact that such person is actually dead—not merely that he has disappeared or cannot be found—that vital fact of his death must be proved by direct evidence. As the learned district attorney very aptly states it, "direct proof that somebody is dead becomes direct proof that A. B. is dead when the body is identified as that of A. B."

But the meaning and construction of the section becomes plainer when we observe that if the identity of the deceased is involved in the first fact, treated as a compound fact, and requiring direct proof, it is also embraced in the second fact which is equally a compound fact, and which may be proved by indirect evidence. The second clause reads: "The fact of the killing by the defendant as alleged;" not merely a killing, but the killing as alleged; the precise killing with which he stands charged; in

the present case, not simply the killing of somebody, but the killing alleged, that of Peter Bernard, the identical person, whatever his name, whose dead body has been found. The killing of that particular person is, therefore, again a compound fact made up of violence causing death, and its infliction upon the person of the alleged victim and none other than he. Under the second clause, by its explicit terms, it may be proved, by circumstantial evidence, that the prisoner killed Peter Bernard, for that is the killing alleged, and no other is admissible, or referred to. It would seem to follow, therefore, upon the construction asserted by the defence, that the same identification, as a limitation upon the death, must be proved by direct evidence, but as a limitation upon the killing may be proved by indirect evidence. No such confusion or contradiction was intended or effected. The requirement of the Code goes upon the assumption that the identity of the deceased, either by name or description, has been established in the ordinary way, and then requires that the death of that person, thus identified, shall be directly proved, and the killing by the prisoner of the same person shall be shown beyond a reasonable doubt. Those two facts alone are the subject of the legislation, and they are properly referred to as "each," and correctly described as the "former" and the "latter." No purpose to change the settled rule of the common law is disclosed, but simply an intent to declare it as it had long existed. The trial judge, therefore, was right, and the General Term was in error.

We have read the evidence given carefully. That the body found was that of Peter Bernard was established beyond reasonable doubt. The prisoner was a witness in his own behalf. He shows that he and Bernard were in the locality where the body was found at about the date of the latter's disappearance. His own declarations show that he had no doubt of the identity of the body found. He explains his possession of a twenty dollar bill which in some manner he got from Bernard, but the explanation is not at all probable or satisfactory. The evidence of the persons who claim to have seen the deceased after the date of the murder was probably honest, but quite certainly mistaken. He was a total stranger to them, and their comparison was founded on a photograph. In the case of Webster there were five persons who honestly believed that they saw Parkman alive after he had

in fact been killed. Upon the whole case we see no sufficient reason to distrust the conclusion which the jury reached.

The judgment of the General Term should be reversed, and that of the Oyer and Terminer of Clinton county affirmed.

All concur, except Gray, J., dissenting.

Judgment reversed.

State v. Davidson, 30 Vt. 377; *Lee v. State*, 76 Ga. 498; *Stocking v. State*, 7 Ind. 326; *Ruloff v. People*, 18 N. Y. 179; *State v. German*, 54 Mo. 526; *Dreesen v. State*, 56 N. W. 1024; *People v. O'Connell*, 29 N. Y. S. 195; *Com. v. Johnson*, 29 Atl. 280; *State v. Smith*, 37 Pac. 491; *State v. Smith*, 9 Wash. 341; *U. S. v. Williams & Cox*, 1 Clifford 5; N. Y. Penal Code, Sec. 181; May, Sec. 126; Minn. Stat. 1894, Sec. 6435; Wharton, Sec. 311.

(2¹) Cause of.

The act must have been the natural cause of the death, but it need not have been the direct cause, for if it is indirect and contributing merely it is sufficient.

STATE v. BANTLEY.

Supreme Court of Errors of Connecticut, 1877.

44 Conn. 537.

PARDEE, J. On the night of June 11th, 1876, the accused inflicted a severe gun-shot wound upon the arm of one March, between the elbow and shoulder. March died eleven days thereafter of lock-jaw. The prosecution claimed that death resulted from the wound; the accused claimed that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon, afterwards to the time of death by another; these differed radically as to the manner in which the case should have been treated.

The counsel for the accused claimed, and asked the court to charge the jury, that if they should find that the death of March was the result or consequence of willful mismanagement or gross

carelessness on the part of the attending surgeons, they could not find the accused guilty of manslaughter, as charged in the information. The court charged the jury, that unless they should find that March died from a wound inflicted on him by the accused, as charged in the information, they could not convict him of manslaughter; but that if they should find that the accused willfully, and without justifiable cause, inflicted on March a dangerous wound, from which death would be likely to ensue, and if they should find also that his death did in fact ensue from and was caused by the wound, and not from any other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial, and the treatment of the case by them, whatever it may have been, could not avail the accused as a defence. The jury having returned a verdict of guilty, the accused moved for a new trial for error in the charge.

As to the law applicable to this case, Roscoe says: "The law on this point is laid down at some length by Lord Hale. If, he says, a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill application by the party or those about him of unwholesome salves or medicines the party dies, if it clearly appears that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect it turn to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causa causans*." Roscoe's Criminal Evidence, 7th ed., 717; 1 Hale P. C., 428. In *Rex v. Rews, Kelynge*, 26, it was holden that neglect or disorder in the person who receives the wound will not excuse the person who gave it; that if one gives wounds to another who neglects the care of them

and is disorderly, and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter according to the circumstances of the case, because if the wounds had not been given the man had not died. In *Regina v. Holland*, 2 Mood. & Rob., 351, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated; at the end of a fortnight lock-jaw came on and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. Maule, J., held that a party inflicting a wound which ultimately becomes the cause of death is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In *Commonwealth v. Pike*, 3 Cush., 181, it was held that where a surgical operation is performed in a proper manner and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. Greenleaf says (*Greenleaf's Ev.*, 3d vol., sec. 139, 5th ed.), "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder unless he can make it clearly and certainly appear that the maltreatment of the wound or the medicines administered to the patient or his own misconduct, and not the wound itself, was the sole cause of his death, for if the wound had not been given the party had not died." In *Rex v. Johnson*, 1 Lewin C. C., 164, the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. Hallock, B., directed an acquittal, observing that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operation of the several causes and to say with certainty that the death was immediately

occasioned by any one of them in particular. Of this case Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct. Roscoe's *Crim. Ev.*, 7th ed., 718. In *Rex v. Martin*, 5 Car. & P., 130, where the deceased, at the time when the blow was given, was in an infirm state of health, Parke, J., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." In *Commonwealth v. Hackett*, 2 Allen, 136, it was held that one who has willfully inflicted upon another a dangerous wound, with a deadly weapon, from which death ensued, is guilty of murder or manslaughter as the evidence may prove, although through want of due care or skill, the improper treatment of the wound by surgeons may have contributed to the death.

Upon these authorities we may state the rule as follows: If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death.

There is no such defect in the law as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or the ignorance of his victim; or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case.

Indeed counsel for the defendant do not really deny the force of the rule. Their complaint is rather in the nature of a verbal criticism of the charge. The judge said to the jury that if the death of March resulted from the wound and from no other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial. It is to be presumed in favor of a charge that it refers to matters concerning which witnesses have testified and to points concerning which counsel have presented arguments; and it is not to be presumed that it includes within its scope all possibilities. From this record

we cannot perceive that any witness suggested even that the attending surgeons caused the death of March by an intentional misapplication or withholding of remedies, or that counsel in argument intimated any such thing. The motion states that the two doctors differed radically regarding the treatment proper for the case; the claim of each as to the other was that he had erred through ignorance, not by criminal intention; and when the judge used the expression complained of in this case, we are to presume that he referred, and that the jury understood him to refer, to that kind of mismanagement alone of which witnesses had testified and concerning which counsel had argued in their hearing. With this limitation the defendant has no occasion for complaint.

A new trial is not advised.

In this opinion the other judges concurred.

People v. Rockwell, 39 Mich. 503; *Com. v. Campbell*, 7 Allen 541; *State v. Scates*, 5 Jones (N. C.) 420; *People v. Ah Fat*, 48 Cal. 61; *Smith v. State*, 50 Ark. 545; *State v. Smith*, 73 Ia. 32; *Hendrickson v. Com.*, 85 Ky. 281; *State v. Costello*, 62 Ia. 404; *Com. v. Hackett*, 2 Allen 136; *State v. Landgraf*, 95 Mo. 97; *State v. O'Brien*, 81 Ia. 88; *Livingston v. Com.*, 14 Grat. 592; *People v. Carter*, 56 N. W. 79; *People v. Elder*, 100 Mich. 515; *Bish. II.*, Sec. 639; *Clark*, p. 128; *Wharton*, Sec. 307 (a); *Hawley & McGregor*, p. 120.

(3¹) Time of Death.

The death must occur within a year and a day from the time when the injury was inflicted.

State v. Orrell, 1 Dev. (N. C.) 139; *State v. Mayfield*, 66 Mo. 125; *People v. Aro*, 6 Cal. 208; *May*, Sec. 219; *Wharton*, Sec. 312; *Hawley & McGregor*, p. 121.

(2) *Kinds.*

(a) Justifiable Homicide.

A justifiable homicide occurs where life is *necessarily* taken in the lawful discharge of a legal duty.

(1¹) In the Punishment of Crimes.

One who, in accordance with the forms of law and under a valid judgment of death, executes a criminal, or takes life, a felony having been committed, in order to effectuate an arrest, commits a justifiable homicide.

UNITED STATES *v.* RICE.

Circuit Court of the United States, 1875.

1 Hughes, 560.

(See page 121 for this case.)

People v. Kilvington, 37 Pac. 799; *Clements v. State*, 50 Ala 117; *U. S. v. Clark*, 31 Fed. Rep. 710; *Wolf v. State*, 19 Ohio St. 248; *Kelly v. State*, 68 Fed. 652; *State v. Moore*, 39 Conn. 244; *State v. Turlington*, 102 Mo. 642; *State v. Bland*, 97 N. C. 438; *Jackson v. State*, 76 Ga. 473; *Dilger v. Com.*, 88 Ky. 550; *Head v. Martin*, 85 Ky. 480; *State v. Dierberger*, 96 Mo. 666; Minn. Stat. 1894, Sec. 6460; N. Y. Penal Code, Sec. 204; May, Sec. 218; Wharton, Sec. 508; Clark, p. 134; Hawley & McGregor, p. 123.

NOTE.—Some States hold that an officer can never take life in order to arrest for a misdemeanor.

Head v. Martin, 85 Ky. 480; *Dilger v. Com.*, 88 Ky. 550; Clark, p. 135; Hawley & McGregor, p. 129.

(2¹) In the Prevention of Crime.

One is justified in preventing a felony even to the extent of taking life if necessary.

PEOPLE v. COLE.

Court of Oyer and Terminer of New York, 1857.

4 Park Cr. Rep. 35.

EMOTT, P. J. After some remarks upon the importance of the cause, and the relative duties of the court and jury in such cases, the judge proceeded as follows:

This indictment is for the killing of Aaron Cole by the prisoner, Benjamin Cole, by shooting him with a gun, on the 7th day of June last, and it is charged by the prosecution to have been done willfully, and with premeditation. The taking of the life of Aaron Cole by the prisoner, as also the killing of Charles Salpaugh, at the same time, by the discharge of the other barrel of the gun, is proved, and indeed admitted, and the only questions for you are, under what circumstances, and with what design, the prisoner destroyed the life of Aaron Cole. The circumstances attending the death of Salpaugh are only important as affecting these questions. So also the quarrels between these parties of fishermen, the interference of one party with the nets of the other, and any invasion or threatened invasion of such property, can have no other bearing. No such quarrels, threats or invasions of property can justify or excuse the taking of life, and you must remove all these facts from your consideration, except so far as they go to show the intention of the prisoner, or characterize the acts of the deceased, and thus to justify or mitigate the homicide, which they do but remotely, if at all.

The character of the prisoner has been proven to have been good. He is spoken of as a quiet and peaceable man. Character is important in a case where it is doubtful upon the evidence whether the prisoner committed the act, and where the jury have a right to weigh probabilities. As this case stands, although

we did not feel justified in excluding the evidence, its bearing is more remote, and the fact of the prisoner's previous good character can only aid you in deciding with what intention and at what suggestions he fired the fatal shot, if it can aid you at all.

The defence assert that this act is justified by the facts proved in the case, and the first question for you will be whether it is so.

So it is said that the prisoner was justified in killing Aaron Cole in self-defence. The right of self-defence is a right which is inherent in man; it is the instinct of our nature to assert it when we are in peril, and it would be in vain for human laws to attempt to oppose its exercise. Our law recognizes and defines it. To justify the prisoner in killing Aaron Cole in self-defence, it is necessary that the prisoner himself should have been attacked—that he should have reasonable ground to suppose that the object of the attack was to kill him, or to do him great bodily harm; that he should have been unable to withdraw himself from this imminent danger, and therefore should have been compelled to kill Aaron Cole to protect himself from the attack.

You will now recur to the facts, some of which are undisputed, and upon some of which there is a conflict of evidence. It will not probably be necessary for you to go further back in the history of this transaction than to the approach of the boat of Cole and Salpaugh to Kipp. The alleged threats against Kipp are of no importance in this part of the case.

It would seem that when Salpaugh and Aaron Cole came up, having been informed of Kipp's threatening and brandishing his gun, they rowed up to his boat. One, or both—it is disputed which—struck with oars, either at Kipp or at his gun, or first at the gun and then at him. Kipp and other witnesses for the defence swear that he was knocked down with the oar; he says he was stunned. There were undoubtedly outcries and threats of some kind; Salpaugh and Aaron Cole sprang into Kipp's boat, and attacked, and probably beat him with their fists; and some of the witnesses for the defence say they dragged him to the side of the boat as if to plunge him in the river. It is also said that the prisoner called to Cole and Salpaugh to desist. Whether they were engaged in this attack upon Kipp, or were leaving the boat when the shots were fired, is disputed; and this point it will be

important for you to determine in this and also in another part of the case. It is also disputed, and it is also important for you to ascertain, how far the prisoner was from these parties, that you may determine whether he was in instant danger from these men, and to what extent he was surrounded so as to prevent his escaping if he were in danger. The witnesses are in conflict upon this question, and you must decide which is the correct account of the transaction. You have evidence of the character and appearance of the wounds inflicted upon Salpaugh and Cole, and the extent to which the shot scattered; and this may assist you in ascertaining how far they must have been from the muzzle of the gun when it was discharged.

But the question for you is whether the prisoner was attacked by Aaron Cole, and, unable to escape, was in imminent danger from his attack, so that he was driven to take his life to save his own. Mere threats of what would be done after the design upon another was effected, are not enough. Mere apprehension of danger is not enough. There must be an attack by the person killed upon the prisoner, and imminent instant danger. It is true that a man will not be responsible for a mistake which he makes in self-defence, in supposing a deadly design which does not exist. But he must be actually assailed, and he must show reasonable ground for supposing that his only recourse is to kill his assailant.

1. It is for you to say whether the facts of this case sustain such a belief. If you come to that conclusion you will acquit the prisoner.

2. If you are not convinced that such a necessity, real or reasonably apparent, existed for the prisoner to take the life of Aaron Cole, then you must inquire if the act can otherwise be justified.

It is claimed to be justified as necessary and lawful for the protection of Kipp. This depends upon a different clause of the statute, and upon different principles. At the common law, if A. was attacked by B., and was in urgent and immediate peril of his life, and C. interposed to preserve the peace, or even to aid A., and it was actually necessary to kill B. to terminate the affray and save the life of A., a third party would be excused for killing him. This principle is preserved in the statute.

Homicide is justifiable when committed "necessarily in lawfully keeping and preserving the peace." You will observe that the language of this section is very different from that of the former. In the section or clause justifying self-defence, all that is required is that the jury should see that the man had reasonable ground for believing himself in instant peril. To a certain extent a man must be his own judge in such a case, and if he acts honestly and upon reasonable ground, he will not be held accountable for a mistake made under such excitement and in great apparent personal danger to himself.

But where a man interposes when another is attacked, it must be to keep the peace, and the protection of another must be incidental to this.

And if he killed another under such circumstances, it must be shown that it was actually necessary for him to do so, not that he had reasonable ground for believing it necessary, but that there was really no other way to prevent the commission of a felony.

The aspect in which this principle is said to be applicable to the present issue, is that the killing of these two men was necessary to prevent them from taking the life of Kipp. It is said that this is a dangerous defence to be allowed, and there is force in the remark. The principle of the proposed defence, however, is true and right; it has always been a maxim of the common law, and we cannot believe that it has been designedly omitted from our statute book. If one of you were to be passing in our streets, and see an assassin with the knife or the pistol at the breast of another, it cannot be that the law would hold you guilty for even the homicide of the assailant, if necessarily committed to arrest his act. But there is danger in the application of the principle to cases, and juries must be on their guard and be sure that a case comes clearly and beyond all doubt within the rule before they apply it.

It cannot be said that to keep the peace in a mere affray, a fist fight, it can be necessary to resort to firearms or to take life in any case. It would not be justifiable for a person assailed with the mere naked fists to use deadly weapons himself, much less can a third person excuse such an act.

You must therefore be satisfied in the present instance, in the first place, that Salpaugh and Aaron Cole designed and were at-

tacking Kipp to kill him, to drown him, or to take his life in some other way, or to maim him. If the actual purpose of these men was, in your opinion, only to beat Kipp with their fists—to have a fight or an affray—it could not have been necessary, and it cannot be justifiable for the prisoner to use firearms.

It is contended that the proof shows an actual intention by these men to take Kipp's life, either (1) with his gun, which they were proceeding to take away from him, or (2) by drowning him. The testimony relied upon to show this, consists of the threats sworn to, and the alleged dragging Kipp to the side of his boat to throw him over. On the other hand, it is said that the only design upon the gun was to make it go off by striking it, and thus render it harmless to these men themselves; and the purpose in getting into Kipp's boat was merely to have a fight.

This is a question for you. If you think that nothing more than a beating with fists was designed and perpetrated, or about to be inflicted on Kipp, then this justification fails. If, however, you are satisfied that the design and attempt was to put him overboard or kill him, then you will have to inquire in the second place whether it was actually necessary in point of fact for the prisoner to kill these men—to kill Aaron Cole, as he did, to prevent the death of Kipp. In this inquiry it will become important for you to determine the relative position and distance apart of these parties at the time of the shot. It is said by the prosecution, that when these shots were fired these men had left Kipp, and were leaving his boat; and that this is shown by the place and manner in which the shot entered their bodies. The witnesses disagree as to the distance apart, the position of other boats, and the number surrounding Kipp and the prisoner. If this affair had occurred on land, where actual manual interference could have been resorted to, it is not easy to see how any necessity for the use of firearms could have arisen. The fact that the parties were upon the water in boats is undoubtedly to be considered.

It is for you to say how controlling an element this circumstance shall become. You must be satisfied that it was actually necessary, to prevent the commission of a homicide of Kipp, at the time the shots were fired, for the prisoner to kill Aaron Cole, in order to sustain this defence. If you think so, you will acquit the prisoner. But if this act was not necessary, clearly and

strictly necessary, you will be unable to acquit the prisoner. He has then taken human life without necessity, and therefore without justification, and he is morally and legally guilty of a crime, a high crime, and you must say so, and say what the crime is. This will depend upon his design in the act.

The jury found a verdict of "not guilty."

Staten v. State, 30 Miss. 619; *State v. Harris*, 1 Jones (N. C.) 190; *State v. Kennedy*, 20 Ia. 569; *Ruloff v. People*, 45 N. Y. 215; *State v. Benham*, 23 Ia. 154; *Noles v. State*, 26 Ala. 31; *State v. Rollins*, 113 N. C. 722; *Crawford v. State*, 90 Ga. 701; *Mitchell v. State*, 22 Ga. 211; *State v. Moore*, 31 Conn. 479; *State v. Turlington*, 102 Mo. 642; *People v. Payne*, 8 Cal. 341; *In re Neagle*, 14 Sawy. 232; Minn. Stat. 1894, Sec. 6461; Clark, p. 137; Bish. I., Sec. 849 (4); Wharton, Sec. 495; Hawley & McGregor, p. 127.

NOTE.—But one is not justified in taking life to prevent a felony unless its commission is being attempted by *force* and *surprise*, as in the case of a sudden and violent assault with intent to kill or rape or in case of burglary, robbery or arson.

Storey v. State, 71 Ala. 330; *Crawford v. State*, 90 Ga. 701; *Stoneham v. Com.*, 86 Va. 523; *People v. Cook*, 39 Mich. 236; *State v. Moore*, 31 Conn. 479; Clark, p. 138; Wharton, Sec. 496; Hawley & McGregor, p. 127.

NOTE.—The modern doctrine is that when a felonious attack is made with intent to take life or do great bodily harm, one need not retreat, and may resist even to the extent of taking life.

Beard v. State, 158 U. S. 550; *Erwin v. State*, 29 Ohio St. 186; *State v. Donnelly*, 69 Ia. 705; *Kingen v. State*, 45 Ind. 518; *Thomas v. State*, 16 So. 4; *State v. Zeigler*, 21 S. E. 763; *State v. Rheams*, 34 Minn. 18; Bish. I., Sec. 850 (4); Clark, p. 139; Wharton, Sec. 498; Hawley & McGregor, p. 131.

(b) Excusable.

Excusable homicide occurs where some blame is attached to the killing, but it is not sufficient for the law to take cognizance of it.

(1¹) Misadventure.

The homicide is excusable when one doing a lawful act unintentionally kills a person.

REX v. VAN BUTCHELL.

Courts of Kings Bench and Common Pleas, 1829.

(Nisi Prius.)

3 Car. & P. 629 (14 E. C. L.).

THE indictment charged the death to be by the thrusting of a round piece of ivory into and up the fundament and against the rectum of the deceased, William Archer, by the hand of defendant, Van Butchell, thereby causing a wound from which he died. The defendant performed the act in discharge of professional services.

HULLOCK, B. (in summing up).—This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and, even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion, that it makes no difference whether the party be a regular or an irregular surgeon, indeed, in remote parts of the country, many persons would be left to die if irregular surgeons were not allowed to practice. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment,

as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books have said has been read to you, but they do not state any decisions, and their silence in that respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Mr. Justice Blackstone, and no book in the law goes any further. It may be that a person not legally qualified to practice as a surgeon may be liable to penalties; but surely he cannot be liable to an indictment for felony. It is quite clear, you may recover damages against a medical man for a want of skill; but, as my Lord Hale says, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bona fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In the present case, no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. Lloyd has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vexata quæstio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or an unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter. I think that, in point of law, this prosecution cannot be sustained; and I feel bound to say, that no imputation whatever ought to be cast upon the gentleman who is now at the bar, in consequence of anything that has occurred.

Verdict, not guilty.

State v. Morgan, 18 S. E. 937; *Butler v. State*, 19 S. E. 51; *Rex v. Williamson*, 3 Car. & P. 635; *Levett's Case*, 1 Hale P. C. 42; *U. S. v. Meagher*, 37 Fed. 875; *Rex v. Macleod*, 12 Cox C. C. 534; N. Y. Penal Code, Sec. 203; Minn. Stat. 1894, Sec. 6459; Clark, p. 140; Wharton, Sec. 306; Hawley & McGregor, p. 131.

(2¹) Defence.

(a¹) Of Person.

Excusable homicide also occurs where one upon sudden affray, from necessity to save his own life or the lives of those dependent upon him for protection, takes the life of another.

STATE v. PEO.

Court of Oyer and Terminer of Delaware, 1889.

9 Houston, 488; 33 Atl. 257.

(See page 100 for this case.)

State v. Thompson, 71 Ia. 503; White v. Territory, 3 Wash. Ter. 397; Jones v. State, 26 Tex. App. 1; State v. McIntosh, 18 S. E. 1033; Stricklin v. State, 13 So. 898; William v. State, 15 So. 662; People v. Hynman, 33 Pac. 782; People v. Lynch, 35 Pac. 816; State v. Symmes, 19 S. E. 16; State v. Reed, 37 Pac. 174; Wilson v. State, 30 Fla. 234; Lovett v. State, 30 Fla. 142; N. Y. Penal Code, Sec. 205; Floyd v. State, 36 Ga. 91; Hawley & McGregor, p. 131; Minn. Stat. 1894, Sec. 6461; Clark, pp. 139-149.

NOTE.—The right of defence also extends to those who stand in a family relation.

Patten v. People, 18 Mich. 314; Sams v. State, 20 S. W. 737; Fretch v. State, 16 S. E. 102; White v. White, 23 Tex. App. 154; Johnson v. State, 26 Tex. App. 631; Hooks v. State, 13 So. 767; Johnson v. State, 18 S. E. 298; Hathaway v. State, 13 So Rep. 592; Potter v. People, 18 Mich. 314; Chittenden v. Com., 9 S. W. 386; Estep v. Com., 86 Ky. 39; Karr v. State, 17 So. 328; Mallicoat v. Com., 28 S. W. 151; Territory v. Galtiff, 37 Pac. 809; Phepps v. State, 31 S. W. 657; State v. Wilson, 39 Pac. 106; Clark, p. 147; Bishop I., Sec. 877; Wharton, Sec. 494; Hawley & McGregor, 133.

(b¹) Of Habitation.

One commits an excusable homicide who takes life to prevent another from entering his house with force, intending to commit a felony therein.

WRIGHT *v.* COMMONWEALTH.

Court of Appeals of Kentucky, 1887.

85 Ky. 124; 2 S. W. 909.

(See page 113 for this case.)

Carroll *v.* State, 23 Ala. 28; State *v.* Patterson, 45 Vt. 308; People *v.* Lilly, 38 Mich. 270; People *v.* Coughlin, 67 Mich. 466; People *v.* Peacock, 40 Ohio St. 333; State *v.* McIntosh, 40 S. C. 349; Clark, p. 142; Wharton, Sec. 503; Hawley & McGregor, p. 132.

(c) Felonious Homicides.

All homicides not justifiable or excusable are felonious.

(1¹) Murder.

Murder is the unlawful killing of a human being with malice aforethought, which is an essential and characteristic element of murder, and means that "The fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit."

COMMONWEALTH *v.* DRUM.

Supreme Court of Pennsylvania, 1868.

58 Pa. St. 9.

INDICTMENT of William Drum for the murder of David Mohigan.

JUSTICE AGNEW charged the jury as follows:

Gentlemen: The solemnity of the form in which the prisoner has been arraigned, and through which you have been set apart to become his triers, is well calculated to impress your minds with the high responsibility of the duty you have taken upon you. It should remind you that you are not to be blind to the interests of society in the pity you may feel for his youth; nor to forget the justice due to him in the horror you may feel for the crime. Following the pathway of the evidence, you should turn neither to the right nor the left, except as its light may illumine, guide and direct you. Have you any impressions unfavorable to capital punishment? You must discard them, knowing and feeling the conviction that not you, but the law inflicts it. You do not pronounce the sentence which condemns to death; that belongs to the court; but you simply say whether he has committed the deed which the indictment charges against him; you only find a true verdict.

You must not be affrighted from duty by the consequences of your finding. The weak and timid mind, alarmed at the picture which eloquence invokes, shrinks and often fears to follow whither the evidence leads. But the consequences are not yours—they follow the crime and not the finding. You should then dismiss the fear of consequences from your minds, except so far as their dread import should make you cautious, deliberate and just in weighing the evidence, and clear and satisfied in the judgment you form upon it. If, through fear, pity, indignation or passion, you suffer your minds to be drawn away from a true and just verdict, you do err. Remember this, as a kind and faithful warning of the minister of justice, to preserve you wholly blameless in the high office you are called to perform.

The law of our State has made wilful, deliberate and premeditated murder a capital crime. Sworn, as we are, to obey that law, we must know no other guide, remembering that the powers that be are ordained of God, and that we needs must be subject to them, not only for the wrath they may invoke, but for our own conscience' sake. Then hold the balance firmly, that justice may be done both to the Commonwealth and to the prisoner; such words as rich and poor, high and low, should have no place in your thoughts. You would not willingly err, but you must en-

deavor not to err. Search your consciences for the source of every judgment. Let your convictions, carefully and deliberately formed, be such that you may follow them to their fountain in the hidden depths of the heart where the Unseen Eye alone can penetrate, and there, in that dread presence, challenge their true source.

A life has been taken. The unfortunate David Mohigan has fallen into an untimely grave; struck down by the hand of violence; and it is for you to determine whose was that hand, and what its guilt. The prisoner is in the morning of life; as yet so fresh and fair. As you sat and gazed into his youthful face, you have thought, no doubt, most anxiously thought, is his that hand? Can he, indeed, be a murderer? This, gentlemen, is the solemn question you must determine upon the law and the evidence.

At the common law murder is described to be, when a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the peace of the Commonwealth, with malice aforethought, expressed or implied. The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone, a particular ill-will, a spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.

In Pennsylvania, the legislature, considering that there is a manifest difference in the degree of guilt, where a deliberate intention to kill exists, and where none appears, distinguished murder into two grades—murder of the first and murder of the second degree; and provided that the jury before whom any person indicted for murder should be tried, shall, if they find him guilty thereof, ascertain in their verdict whether it be murder of the first or murder of the second degree. By the act of 31st March, 1860, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, delib-

erate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."

In this case we have to deal only with that kind of murder in the first degree described as "wilful, deliberate, and premeditated." Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offence. Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in the evidence.

A learned judge (Judge Rush, in *Commonwealth v. Richard Smith*) has said: "It is equally true both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it." But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought, that no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent; that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and to premeditate.

The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree, under the act of Assembly, lies on the Commonwealth. But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably, and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing. He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an axe, a gun, a knife or a pistol, must, in the absence of qualifying facts, be presumed to know that his blow is likely to kill; and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act. He who so uses a deadly weapon without a sufficient cause of provocation, must be presumed to do it wickedly, or from a bad heart. Therefore, he who takes the life of another with a deadly weapon, and with a manifest design thus to use it upon him, with sufficient time to deliberate, and fully to form the conscious purpose of killing, and without any sufficient reason or cause of extenuation, is guilty of murder in the first degree.

All murder not of the first degree, is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty; but where no intention to kill exists or can be reasonably and fully inferred. Therefore, in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree.

Manslaughter is defined to be the unlawful killing of another without malice expressed or implied; which may be voluntarily in a sudden heat, or involuntarily, but in the commission of an unlawful act. Voluntary manslaughter often so nearly approaches murder, it is necessary to distinguish it clearly. The difference is this: manslaughter is never attended by legal malice or depravity of heart—that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences or cruelty. Being sometimes a wilful act (as the term voluntary denotes) it is necessary that the circumstances should take away every evidence of cool depravity of heart or

wanton cruelty. Therefore, to reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting—if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder.

Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a light and trivial kind. Whenever the act evidences a deadly revenge, and not the mere heat of blood; whenever it is the result of a devilish disposition, and not merely the phrensy of rage, it is not manslaughter, but murder.

Having stated the law of the crime, we now note the law of the evidence. And, first, it may be stated as a general rule, that all homicide is presumed to be malicious, that is, murder of some degree, until the contrary appears in evidence. Therefore, the burthen of reducing the crime from murder to manslaughter, where it is proved that the prisoner committed the deed, lies on him. He must show all the circumstances of alleviation or excuse upon which he relies to reduce his offence from murder to a milder kind of homicide, unless, indeed, where the facts already in evidence show it. But though the homicide, without the circumstances of alleviation or excuse, is presumed to be murder, it is not presumed to be murder of the first degree. The presumption against him rises no higher than murder in the second degree, until it is shown by the Commonwealth to be murder in the first degree. It therefore lies on the Commonwealth to satisfy the jury of those facts and circumstances which indicate the deliberate intention to kill, and the cool depravity of heart and conscious purpose, which constitute, as before stated, the crime of murder in the first degree. When death ensues from the use of a deadly weapon, in a quarrel or affray, the jury must scan closely the conduct of both parties, their former relations and behavior, and the current of events; the character of the weapon, the manner of its use, and circumstances attending it; and by a careful survey of the evidence, must endeavor to arrive at the true

motive and cause which prompted the fatal blow. Has there been a former difficulty? What feeling did it produce, and what design did it beget? Was the weapon prepared, and was the blow given coolly and without rage, or was it a sudden and impetuous impulse, causing the act to be committed rashly and without reflection? Were the parties engaged in mutual combat when the blow was given, or was it given when the prisoner was not fighting? Did he use the weapon when he might have avoided it, or was the attack commenced by the deceased, and continued by him until the fatal wound was given? Was the prisoner hemmed in and without means of escape? Was he in danger of life or great bodily harm, and did he give the blow with the knife under the influence of excitement and fear of loss of life, or the infliction of great injury to his person?

Again, the nature of the weapon, and the place and character of the wound, are important to be considered. Was it a deadly instrument, a knife, a dagger, or dirk knife? The deadliness of the weapon tends to indicate the intention with which it is used. The place where the thrust is made also throws light on the intention. If used upon the arms or legs it may indicate only an intention to cut and wound; if used upon a vital part of the body it may indicate an intention to kill. All these are most pertinent inquiries to be made in this case, in order to apply the results drawn from the evidence to the case as presented by each side. This will be seen at once by noting the different aspects in which the case is presented by the Commonwealth and by the defence. On part of the Commonwealth it is alleged that in consequence of previous difficulties between the prisoner and the deceased, the prisoner armed himself with a dirk knife or dagger, intending to use it upon deceased, if they met and had another difficulty; that when they met on Thursday night, after the deceased was struck at over the railing by Robert Miskelly, he turned downward and toward the curb, and was striking at some one there, and not at the prisoner, and while thus engaged, the prisoner, stepping or leaning forward toward him, extended his arm and gave him the thrust in the left side, which was the next to him. In this view of the case, the preparation of the knife, the entire absence of provocation at the time of giving the wound, the deadly nature of the weapon, and the vital part at which the

blow was aimed, all tend to prove that the killing was wilful; that there was time to deliberate; that the blow was premeditated; that there was no legal ground of provocation, and no impetuous rage or passion. If you believe this is the true version of the case, then you are asked by the Commonwealth to convict the prisoner of murder in the first degree, on the ground that he killed the deceased wilfully, deliberately and premeditatedly, and with malice aforethought. If you should find this to be so, it would constitute in law murder of the first degree.

But the version of the defence is that the knife was not prepared; that it was one which the prisoner carried and used in his hunting excursions, and that he was preparing to go out upon such an excursion; that the deceased, a large muscular and fighting young fellow, was, in consequence of the former altercation, seeking the prisoner to whip him, of which the prisoner was informed; that, discovering him in the saloon, he came there to do so, and waited near by until he came out, and then returning and finding him standing beside the railing, he attacked him, struck him two blows, was diverted a moment by Riley Miskelly taking hold of him; then, after casting off Riley, and dodging the blow of Robert Miskelly, returned to his assault upon the prisoner, and struck him in the face; that the prisoner then taking out his knife, and before the blow could be repeated by the deceased, cut him in the side, making the wound which caused death, and at the time of doing this, he was so hemmed in he could not escape. If these be the facts—the true version of the case, then the defence ask you to say that the wounding was only in self-defence, demanding a verdict of entire acquittal, and if not in self-defence, that at the very most it is but manslaughter.

To excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping, and that his act was one of necessity. The act of the slayer must be such as is necessary to protect the person from death or great bodily harm; and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life, or great bodily injury. If there be nothing in the circumstances indicating to

the slayer at the time of his act that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal, or nearly equal strength, in taking his assailant's life with a deadly weapon. In such a case it requires a great disparity of size and strength on part of the slayer, and a very violent assault on part of his assailant, to excuse it. The disparity on the one hand, and the violence on the other, must be such as to convince the jury that great bodily harm, if not death, might have been suffered, unless the slayer had thus defended himself, or that the slayer had a reasonable ground to think it would be so. The burthen lies on the prisoner, in such a case, of proving that there was an actual necessity for taking life, or a seeming one so reasonably apparent and convincing to the slayer, as to lead him to believe he could only defend himself in that way. The jury will remember I am speaking of wilful killing with a deadly weapon. If this intent to kill existed in the mind of the prisoner at the time of giving the blow, two difficulties arise in the case upon the plea of self-defence, which the jury must pass upon and decide. The attack of Mohigan was made with his fists, no weapon appears to have been used by him; the blows appear to have taken no great effect, and at the time Mohigan was alone, while two persons not unfriendly to the prisoner, were interfering on his behalf. Under these circumstances (if you so believe them), was there any real or apparent necessity to take life for the purpose of defence? Did Mohigan do, or try to do, more than beat the prisoner with his fists? Was the disparity of size and strength of the prisoner so great as to require him to take Mohigan's life to prevent great bodily harm to himself, in such a case where no weapon was used against him? The other difficulty arising upon the plea of self-defence, is whether the prisoner had not an opportunity of escaping down into the saloon, or down street, when Riley Miskelly and Robert Miskelly interfered in his behalf. Taking their testimony, was there anything to prevent his escape when Mohigan was diverted in his attack from him? If you believe Cline, a witness for defence, that Drum had advanced out into the pavement before the entrance to the saloon, and was no longer hemmed in by the railing; and that Mohigan, after leaving Riley and Robert Miskelly,

advanced down the pavement (and the striking downward is corroborated, to some extent, by Stewart), was there anything to prevent Drum's escape? If you think he could readily have escaped without striking the fatal blow; if you think he was not prevented from escaping by the fierceness of the attack, it is not a case of self-defence. The law is too careful of life to permit it to be taken without an excusable necessity.

The next inquiry, and it seems to me the all-important one, is whether the act of the prisoner was manslaughter only. If the prisoner did not meditate the death of Mohigan; if he did not prepare the knife to take his life, and if upon the sudden impulse, arising from the blows he received, and the passion they produced, he drew out his knife in a rage, and gave the fatal blow, it would be manslaughter. Or, if from the suddenness of the attack and an uncontrollable fear seizing him, but without such an excusable necessity as I have described, he drew out the knife and struck the blow without malice, he would be guilty of manslaughter only. Upon this branch of the case I must instruct you that the previous occurrences on Monday night and Thursday night furnished no justification or even excuse to Mohigan in making the attack upon the prisoner on Thursday night at the saloon. This attack constituted a sufficient ground on part of the prisoner to defend himself in a proper manner. But this defence, as I have before said, must not exceed the reasonable bounds of the necessity. Here the jury must attend to this important distinction. The argument of the defence is, that when the slayer is not in fault—is not fighting at the time, or has given up the fight, and then slays his adversary, he is excusable as in self-defence. But though this may be the case, it is not always so. The true criterion of self-defence, in such a case, is whether there existed such a necessity for killing the adversary as required the slayer to do it in defence of his life or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case it would be manslaughter; and if the deadly weapon was evidently used with a murderous and bad-hearted in-

tent, it would even be murder. But a blow or blows are just cause of provocation, and if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm.

The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless. But the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die.

But if the prisoner had prepared the knife and intended to use it for the purpose of killing Mohigan, and merely awaited for an assault by him for an occasion to use it, and in consequence of this premeditated design, did use it, it would be murder, and if the act was at the time done with coolness and deliberation, it would be murder in the first degree. If, however, he had no specific intention of taking life, intended not to kill but only to maim and wound, it would be only murder in the second degree. It is the province of the jury to decide upon the credibility of the witnesses, the kind of offence, and, if it is a murder, to ascertain whether it be of the first or second degree. In deciding upon the case, or upon any material part of it, it is the duty of the jury to give the prisoner the benefit of any reasonable doubt arising out of the evidence which prevents them from coming to a satisfactory conclusion. But this doubt must fairly arise out of the evidence, and not be merely fancied or conjured up. A jury must not raise a mere fanciful or ingenious doubt to escape the consequences of an unpleasant verdict. It must be an honest doubt—such a difficulty as fairly strikes a conscientious mind and clouds the judgment. If the mind be fairly satisfied of a fact, on the evidence—as much so as would induce a man of

reasonable firmness and judgment to take the fact as true, and to act upon it in a matter of importance to himself, it would be sufficient to rest a verdict upon it. As to whether a reasonable doubt shall establish the existence of a plea of self-defence, I take the law to be this: If there be a reasonable doubt that any offence has been committed by the prisoner, it operates to acquit. But if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burthen then falls upon the prisoner, and not on the Commonwealth, to show that it was excusable as an act of self-defence. If, then, his evidence leaves his extenuation in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some of its grades, of manslaughter at least.

Starting, then, with the legal presumption of innocence in favor of the prisoner, until the proof fairly establishes his guilt, the first question to be decided is, whether he is guilty of murder? If he formed the design to kill Mohigan—if, in consequence of this purpose, he prepared or procured a deadly weapon, and carried it about with him to be used when occasion offered itself; and, if when the opportunity arose, he did use it, it would be murder. If at the time he did the act he thought of his purpose to kill him, and had time to think that he would execute it, and formed fully in his mind the conscious design of killing, and had time to think of the weapon he had prepared, and that he would use it, and accordingly so did use it, it would be murder of the first degree. But though he had prepared and carried the weapon, intending to use it, if, at the time the attack was made upon him he had no real intention of killing Mohigan—did not deliberate upon his act—but in the suddenness of the occasion and impetuousness of his temper he intended only to cut, wound or do great bodily harm to him, it would be murder of the second degree only.

But if the weapon was not prepared for the occasion; if the prisoner entertained no previous purpose of killing Mohigan or of doing him great bodily harm; and if, under the impulse of passion, caused by Mohigan's blows, and arising when they were inflicted, the prisoner struck the fatal blow without malice, he is guilty of manslaughter only; even though on the instant and at the suddenness of the provocation he intended to kill Mohigan.

Lastly, if not guilty of manslaughter, was the killing only an act of self-defence? On this subject I have already said enough.

You will now take the case and render such a verdict as the evidence warrants; one which will do justice to the Commonwealth and to the prisoner.

STATE *v.* WALKER.

Court of Oyer and Terminer of Delaware, 1887.

9 Houston, 464; 33 Atl. 227.

INDICTMENT for murder.

COMEGYS, C. J., charging the jury:

All homicides, by the law of this State, are either justifiable, excusable or felonious.

Justifiable homicides are such as are authorized by law, familiar examples of which are the execution of a prisoner by a sheriff under legal sentence, the suppression by peace officers of a riot when it cannot be put down otherwise, etc.

Excusable homicides are those not properly justifiable, but allowable under certain circumstances, for example defence of one's own person, or that of some member of his household, as wife, children, servant.

Felonious homicides, in their turn, are divided into such as are designated as malicious, and not malicious.

Homicides that are not malicious are manslaughter; those malicious are murders.

I will take these up in the order in which I have referred to them, and endeavor to give to you, in plain language, their several distinctions from each other—except that I shall not go further into the subject of justifiable homicides, as this is not one of them. It is claimed by the prisoner's counsel to come strictly and fully within the class called homicides in self-defence.

The placing the prisoner's case upon this ground, makes it necessary that I should go into the law of murder and manslaughter, not only to distinguish one from the other and form

the present defence, but also to enable you to understand the contention of the attorney general that the case is one of murder of the first degree, as charged in the indictment. I shall also instruct you sufficiently I trust in the law of self-defence, to enable you to determine whether this is a case of that kind.

Murder is the unlawful killing by one man of another with malice aforethought. Wherever one kills another, with a wicked purpose of taking his life, or doing him some great bodily harm, it is murder, and murder of the first degree. Where, also, one in endeavoring to perpetrate some crime punishable with death, kills another, he is guilty, by our statute, of murder of the first degree. Where one in endeavoring to commit some felonious crime, kills a human being, or kills one in doing some deliberate cruel act, he is also guilty of murder, but not murder of the first degree as our statute describes it: but is guilty of the crime of murder of the second degree under the statute. These are cases of malicious homicide: and without the ingredient of malice, there can be no murder. Now what is malice, to make a homicide murder? Malice is a state and condition of the mind or heart, which is best understood as wickedness. Its existence in the case of a homicide is shown by the character of the act done. If there be preconceived purpose to take life, as shown by threats, lying in wait, the selection of a deadly instrument or weapon likely to produce death and use of it in pursuance of the threats, etc., it is called express malice aforethought, and murder of the first degree. Where such, or the like circumstances do not exist, and yet the wantonness of the act done, as shooting or driving into a crowd, or its wickedness, in the deliberateness and cruelty with which it is perpetrated, evince a depraved and vicious disposition, or as it sometimes expressed at heart regardless of social duty and fatally bent on mischief, then there is malice implied in law, and murder of the second degree. These degrees were unknown to our law before 1852: every malicious homicide was punishable with death down to that time, now those of the second degree are punished by imprisonment for life.

Manslaughter is committed, generally, where two men fight upon a sudden affray, and, in the heat of blood, one kills the other. If the fight were originated between them with the pur-

pose of taking life, and one were slain, it would be murder of the first degree—the mutual agreement to fight to the death if necessary would not remove such a homicide from the scope of murder of the first degree. Killing a man in a duel is murder of such degree. The contest, to avoid a higher crime than manslaughter, must have been unpremeditated and sudden, and the slaying must have been under the influence of such a degree of heat, or transport of passion as virtually to deprive the slayer of control over himself. If the jury do not find this to be the case, then they would be justified in believing that the slayer acted under the influence of preconceived malice or design, and availed himself of the occasion to exercise it, and therefore find him guilty of murder of the first degree.

Self-defence, or killing another in defence of one's own person, is, mostly, where one is suddenly assailed by another without any fault on his part, and under such circumstances as to give him just and reasonable ground to believe that he is in danger of losing his life or suffering some great bodily harm, or, as oftentimes expressed to indicate the degree of such harm, enormous bodily harm. In such case the assailed need not wait for the apprehended injury by his adversary, but may take his life if necessary to protect his own person. But before he may do this, he must do all in the power of a reasonable man, similarly circumstanced, to avoid the assault of his adversary. If it be so suddenly made, and with such a weapon as is likely to produce death or such enormous bodily harm as to imperil life, and the assailed cannot escape the fury of his adversary, he may slay his enemy. But with whatever weapon the attack is made or attempted, if there are means of escape open to the assailed, he may not take the other's life until they have been tried and failed to protect. In other words, he must retreat from his assailant or pursuer as far as he can, and never until he has done this unavailingly, can he meet his opponent and slay him. This is illustrated by the familiar instance given of two men in a room and one assailing another to take his life or inflict upon him some great harm, as mentioned; in such case the assailed must retreat as far as he can—be driven to the wall, as we often say figuratively with respect to other pressure in life—before he takes upon himself the final remedy for protection. If life or person can be

protected in any other way than by taking life, it must be done, or the homicidal act will be treated in law as a malicious, or murderous one. The law is so tender of human life that no man must take that of another man even in the exercise of what is oratorically called the sacred right of self-defence, unless he has no power reasonably within his reach by retreat or otherwise, to save his own life without doing so, or protecting his own person from great and dangerous harm.

Having now given you, I hope, all necessary instruction about the law of homicide, I will turn my attention to the prayers of respective counsel in this trial. And I will take those of the attorney general first.

(Here read it.)

To the first I answer in the affirmative—that is, that Barr's quarrel with the prisoner, has of itself nothing to do with the case. But I think it proper to add, that if from the circumstances deposed to by the witnesses for the defence, if you believe their testimony with respect to them, and discredit that of the State's witnesses with respect to the matter, you think a reasonable man would have been justified in believing that Mulvey was advancing upon him as an accomplice or confederate of Barr, then the case is the same as if Barr had acted alone and been where Mulvey was at the time of the fatal blow. Under such circumstances, whatever he could have done to Barr could have been done to Mulvey. I have already gone into the law far enough to point out to you that life cannot be taken, if adequate protection by retreat or otherwise can be secured otherwise.

To the second (here read it) I answer that no more words or gestures will reduce homicide from murder to manslaughter—no matter how offensive or insulting they may be. If such excuse only exist for the use of a deadly weapon, the law affixes the term malicious to the act, and it is murder.

To the third (here read it) I answer that it is true that the natural and probable consequences of an act, that is those that are likely to flow from it, are presumed in law to be intended by the actor; and the burden of showing the contrary is on him; and further, that where killing is admitted, it is presumed to be done with malice aforethought, if a deadly weapon be used.

With regard to the prayers of the prisoner's counsel, I answer.

As to the first (read it) I answer that to justify taking life by a person assailed, it must be to protect his own, or his person from great bodily harm, and there must be no other way open to him as a reasonable man, by retreat, or otherwise to do so. In such a dilemma any weapon of defence may be used.

As to the second (read it) the law does not imply malice in any case where death ensues from the use of a weapon neither deadly nor dangerous in itself: but whether it be dangerous or deadly is a question for the jury upon satisfactory proof of what it was, or if such cannot be made, of the effect it produced. Of course no one can be convicted of murder without proof, express or implied, of malice.

As to the third (read it) I repeat the substance of the charge in the Talley case, upon this point of reasonable doubt: that if you, gentlemen, after a calm review of all the testimony in this case, and regarding it alone, have in your minds a reasonable doubt of the guilt of the prisoner, a doubt growing out of the testimony before you, the prisoner is entitled to the benefit of that doubt and ought to be acquitted in manner and form as he stands indicted, which is for murder of the first degree. But if you so doubt, and yet believe from the testimony before you that he is guilty either of murder of the second degree or of manslaughter, as I have defined them respectively to you, you may convict him in your discretion of that one of them, which in your judgment the facts will support you in determining.

Verdict of murder in the second degree.

Com. v. Webster, 5 Cush. 295; *Hopkins v. Com.*, 50 Penn. St. 9; *People v. Williams*, 43 Cal. 344; *Jones v. Com.*, 75 Pa. 403; *People v. Croy*, 56 Cal. 36; N. Y. Penal Code Sec. 183; *State v. Smith*, 56 Minn. 78; *Bish. I.*, Sec. 600; *Clark*, p. 158; *Wharton*, Sec. 303; *Hawley & McGregor*, p. 137.

Murder and manslaughter: *Maier v. People*, 10 Mich. 212; *Com. v. Macloon*, 101 Mass. 1; *Wellar v. People*, 30 Mich. 16; *Nye v. People*, 35 Mich. 16; *State v. Roberts*, 1 Hawks 349; *Shufflin v. People*, 62 N. Y. 229; *Reg. v. Rothwell*, 12 Cox C. C. 145; *Reg. v. Porter*, 12 Cox C. C. 444; *Crainger v. State*, 5 Yerg. 459; *Erwin v. State*, 29 Ohio St. 186; *Judge v. State*, 58 Ala. 406.

Murder defined in: *Perry v. State*, 43 Ala. 21; *Temple v. State*, 40 Ala. 350; *State v. Phelps*, 24 La. Ann. 493; *McAdams v. State*, 25 Ark. 405;

Bradley *v.* State, 31 Ind. 492; Alford *v.* State, 33 Ga. 303; Pamore *v.* State, 29 Ark. 248; Smith *v.* State, 49 Ga. 482; State *v.* Morphy, 33 Ia. 270; State *v.* Jones, 64 Mo. 391; U. S. *v.* Magill, 1 Wash. C. C. 465; Com. *v.* Drum, 58 Pa. St. 9.

(a¹) Self Murder or Suicide.

Suicide or self-murder was a felony at common law, and punishable by a forfeiture of goods and chattels. In America there being no forfeiture, it is a punishable offence.

Bish. Cr. Law, 511, 615, 616; Com. *v.* Mink, 123 Mass. 422; The Penal Code of Pa.; Shields, vol. I., 429.

At the common law one who advises, aids or assists another to kill himself, and the act is done in his presence was guilty of murder. If done out of his presence the act of so advising, aiding and assisting was not punishable.

COMMONWEALTH *v.* BOWEN.

Supreme Court of Massachusetts, 1816.

13 Mass. 354.

THE indictment against the prisoner contained two counts. The first count alleged, that one Jonathan Jewett, in the night time of the 8th of November last, at Northampton, murdered himself by hanging himself; and that the prisoner, Bowen, before the said self-murder, on etc., at, etc., feloniously, wilfully, and of his malice aforethought, did counsel, hire, persuade, and procure the said Jewett the said felony and murder of himself to do and commit; and so that the said Bowen feloniously, etc., did kill and murder, etc. The second count alleged, that the prisoner murdered the said Jewett by hanging him; against the form of the statute, etc.

The evidence was, in substance, that Jewett was convicted, at the last September term in this county, of the wilful murder of his father, and, being sentenced to suffer death, the 9th of

November last was appointed, by the supreme executive authority of the Commonwealth, for his execution. The prisoner was confined in an apartment of the prison adjacent to that in which Jewett was, and in such a situation that they could freely converse together. The prisoner repeatedly and frequently advised and urged Jewett to destroy himself, and thus disappoint the sheriff, and the people who might assemble to see him executed; and, in the night preceding the day fixed for his execution, he put an end to his life by suspending himself by a cord from the grate of the cell in which he was imprisoned. An inquisition was taken by the coroner's jury, who returned that he was a felon of himself.

Morton (attorney general) for the Commonwealth, contended, that the prisoner was guilty of murder, as principal; and he cited and relied chiefly on the following authority from Kelyng's Reports, 52. "Memorandum, that my brother, Twisden, showed me a report which he had of a charge given by Justice Jones to the grand jury, at the King's Bench barre, Michaelmas Term, 9 Car. 1, in which he said, that poisoning another was murder at common law. And the statute of 1 Ed. 6 was but declaratory of the common law, and an affirmation of it. If one drinks poison by the provocation of another, and dieth of it, this is murder in the person that persuaded it. And he took this difference. If A. give poison to J. S., to give to J. D., and J. S., knowing it to be poison, give it to J. D., who taketh it in the absence of J. S., and dieth of it; in this case, J. S., who gave it to J. D., is principal; and A., who gave the poison to J. S., and was absent when it was taken, is but accessory before the fact. But if A. buyeth poison for J. S., and J. S., in the absence of A., taketh it and dieth of it, in this case A., though he be absent, yet he is principal. So it is, if A. giveth poison to B., to give unto C., and B., not knowing it to be poison, but believing it to be a good medicine, giveth it to C., who dieth of it; in this case, A., who is absent, is principal, or else a man should be murdered, and there should be no principal. For B., who knoweth nothing of the poison, is in no fault, though he gave it to C. So if A. puts a sword into the hands of a madman, and bids him kill B. with it, and then A. goeth away, and the madman kills B. with the sword, as A. commanded him, this is murder in A., though ab-

sent, and he is principal; for it is no crime in the madman, who did the fact by reason of his madness."

Nor was the murder less atrocious in the case at bar, or the guilt of the prisoner less heinous, because the death of Jewett must inevitably have taken place within a few hours; for a man is under the protection of the law until he dies by order of law. Indeed, so strict is the law in regard to life, that, if the sheriff is, by his warrant, commanded to hang one, and he beheads him, the sheriff in such case is guilty of felony, if not of murder.

Bates and Lyman, for the prisoner, argued, that murder at common law is confined to the taking the life of another, and a *felo de se* is never called a murderer. Our legislature seem to use the word in the same definite sense. By the statute of 1804, c. 123, sec. 1, it is enacted, "that, if any person shall commit the crime of wilful murder, or shall be present, aiding and abetting in the commission of such crime, or, not being present, shall have been accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, every such offender shall suffer the punishment of death." It is plain, that suicide is not included in this clause; for it provides that he who counsels, etc., shall receive the same punishment as the principal offender. The crime, then, which the prisoner is charged with counselling and procuring, was not "such crime" as the statute contemplates, namely, murder, but *felonia de se*. For this latter crime a punishment was provided by a law of the colony, passed in 1660. That suicide was not intended to be included in the forecited enacting clause, is further evident from the second section of the same statute, which provides, among other things, for the punishment of such as shall knowingly receive, harbor, comfort, etc., any principal offender after a wilful murder done and committed as aforesaid. It seems, then, that no punishment has been provided by statute for him who counsels the commission of suicide.

At the common law, in all cases of suicide, where the subject of the suicide is not a *felo de se*, those who are counselling, hiring, and procuring the suicide to be committed are principal felons. Because, in such case, the deceased person being innocent of his own destruction, he who would otherwise have been an accessory, from the necessity of the case, is deemed a prin-

cipal. Such are the examples put by way of a memorandum in the passage cited by the attorney-general from Kelyng. But in this case Jewett was a *felo de se*. It is so alleged in the indictment, and the allegation has been proved by the inquisition of the coroner's jury. The prisoner, then, if indictable at all, was indictable only as an accessory. He cannot be convicted as a principal.

It was insisted, also, by the counsel for the prisoner, that it was not sufficient for the government, to produce a conviction, to prove only, that Jewett killed himself, and that Bowen advised and urged him to commit the fact. It must be made to appear, that the advice was the procuring cause of the death. And on this point it was strongly argued that the evidence wholly failed.

The attorney general, in reply, insisted, that the adviser of one who commits a felony of himself, is a murderer, and this is laid down by Blackstone. The facts in proof abundantly showed the prisoner to have been guilty of this offence; and that his advice was at least one of the procuring causes of Jewett's death.

PARKER, C. J., in charging the jury, stated, that, considering the similarity between the nature of suicide and the murder of another, and the consistency and uniformity of writers and principles on this particular species of murder, if the jury should find the facts as alleged in the indictment, they might safely pronounce the prisoner guilty. The important fact to be inquired into was, whether the prisoner was instrumental in the death of Jewett, by advice or otherwise. (Here his honor recapitulated the evidence.) The question, then, is, Did this advice procure the death of Jewett?

The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as, that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without

doubt he was a hardened and depraved wretch. But it is in man's nature to revolt at the idea of self-destruction. Where a person is predetermined upon the commission of this crime, the reasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the intention, and ultimately procure the perpetration of the dreadful deed. And, if other men would be influenced by such advice, the presumption is, that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still, the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.

If you are satisfied that Jewett, previously to any acquaintance or conversation with the prisoner, had determined within himself that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, as mere idle talk, let your verdict say so. But, if you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly.

It may be thought singular and unjust, that the life of a man should be forfeited, merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offence. Further, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of this offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice; and that but a small portion of Jewett's earthly existence could, in any event, remain to him.

The jury found the prisoner not guilty; probably from a doubt whether the advice given by him was, in any measure, the procuring cause of Jewett's death.

Rex v. Tyson, Russ. & Ry. 522; *Com. v. Dennis*, 105 Mass. 162; *Blackburn v. State*, 23 Ohio St. 146; *Clark*, p. 164; *Bishop I.*, Sec. 510 (2); *Wharton*, Sec. 216; *Hawley & McGregor*, p. 144.

NOTE.—By some State codes one who abets, aids or assists another in taking his life is guilty of manslaughter in the first degree.

Minn. Stat. 1894, Sec. 6429; N. Y. Penal Code, Sec. 175.

NOTE.—Under the common law an attempt to commit self murder is an indictable misdemeanor; under some codes it is a felony, and one aiding or assisting another to such attempt is guilty of a felony.

Clark, p. 164; *Wharton*, Sec. 454; *Bish. Cr. Law*, Sec. 1187; Minn. Stat. 1894, Secs. 6426, 6427, 6432; N. Y. Penal Code, Sec. 178; Penna.: See *Shields' Penal Code*.

(b¹) Resulting from an Attempt.

(1²) To kill the person killed.

PEOPLE *v.* KERRIGAN.

Court of Appeals of New York, 1895.

147 N. Y. 210; 41 N. E. 494.

O'BRIEN, J. The defendant was convicted of the murder of one Aaron Alexander in a saloon in Rivington street in the city of New York on the night of April 3, 1894. That the deceased died from the effects of a pistol shot, fired by the defendant at the time and place above mentioned, is not disputed, the only question being whether the other elements of intent, deliberation and premeditation necessary to constitute the crime were sufficiently established. It appeared from the testimony that the deceased was a strong, powerful man, who was disposed to be quarrelsome, and who actually had some quarrel or dispute with the defendant about a week before the homicide. The particulars of this difficulty do not distinctly appear, and they are material only so far as they tend to show that on the night of the homicide the deceased and the defendant met in the saloon under the influence of those feelings and passions which had been incited by a previous quarrel or serious disagreement. It appears that the deceased, the defendant and several other persons, who associated

more or less with them, were in the habit of meeting at this saloon in the evening for the purpose of drinking and card playing, and, on the evening of the homicide, were all together at an early hour. The immediate cause of the difficulty which preceded the shooting was what the deceased evidently took to be a slight offered him by the defendant. It appears that the deceased, the defendant and five other persons were in the barroom of the saloon on the night in question, and the defendant asked the five other persons to drink beer with him, ignoring the deceased, who immediately took offence and called the defendant offensive and vulgar names, and finally struck him in the face and upon the nose, causing the blood to flow. There is some conflict in the testimony of the witnesses as to what actually took place and was said by both parties at this stage of the quarrel. They all agree, however, substantially, that the defendant received from the deceased one or more severe blows in the face with the fist or, as some of them say, with a beer glass which was held in the hand, and that after this occurred the defendant went into a closet adjoining the barroom, washed the blood from his face, and then passed through the barroom out into the street, through the door. After the lapse of a period of time which is variously described by the witnesses as from five to fifteen minutes, he returned, found the deceased still in the barroom, and pointing a pistol at him fired while the deceased was attempting to escape from him behind the bar. The bullet entered the body of the deceased near the right hip, passed through the pelvis and came out in front, inflicting a wound from which he died soon after.

One of the police officers, who had the defendant in charge after the shooting, testified in substance that the defendant confessed to him that after the quarrel in the saloon and after the defendant had washed the blood from his face, he went directly to his house, which was about two blocks distant, and there procured the revolver and then returned to the saloon and fired the fatal shot at the deceased.

The defendant was the principal witness in his own behalf. He denied that he made any such admissions to the police, swore that he found the pistol in the street in the month of October previous, and that he carried it constantly from that time, and

had it in his pocket when the altercation took place in the saloon, resulting in the blow from the deceased. That upon entering the saloon the second time he took it from his pocket intending only to frighten the deceased. That one of the bystanders, having seized him by the wrist, the pistol was accidentally discharged and in that way the wound was inflicted which produced the death of the deceased, without any intent to kill on the part of the defendant.

The case was submitted to the jury upon the evidence under a careful charge, and the verdict of conviction must be taken as conclusively establishing the facts against the defendant's contention. The defendant's version of the transaction, which, upon its face, was extremely improbable, was discredited and wholly rejected by the jury, and that given by the witnesses for the People has been adopted.

While this court has the power in a capital case to review the facts and to grant a new trial when satisfied that the accused has not had a fair trial, or when injustice has been done, it must observe the rules and principles which apply to all tribunals exercising appellate jurisdiction. It is the province of the jury to determine questions of fact, depending upon evidence in any degree conflicting, and to declare by their verdict what the truth is, and when once determined, upon evidence which is sufficient, even though capable of diverse or opposing inferences, this court has no more right than the trial court to substitute its own judgment in the place of that of the jury, or to usurp its legitimate functions.

The jury must be satisfied of the guilt of the accused beyond a reasonable doubt, and where a conviction has been had in a capital case upon conflicting evidence, this court may undoubtedly grant a new trial when convinced, upon a review of the whole evidence, that the conclusion of the jury was not reasonably possible, or that the proof does not come up to the required standard, or for any other reason injustice has been done. (*People v. Cignarale*, 110 N. Y. 23.)

According to the settled rules adopted and followed by this court for the review of cases of this character, nothing appears on the record that would justify us in interfering with the finding of the jury.

The learned counsel for the defendant does not rest the appeal upon the ground that the shooting was the result of accident. That was the theory of the defendant himself when on the witness stand. It would be manifestly impossible for any appellate court to give any weight to a theory so improbable after it had been discredited by the verdict of the jury.

The argument now submitted for the defendant suggests that the homicide was not committed with the deliberation and premeditation which is an essential element of the crime of murder in the first degree. It is quite possible that if the defendant had fired the fatal shot while resisting the assault upon him by the deceased, or at the moment that he had received the blow in the face, that the degree of criminal responsibility would be changed. But the jury have found that, whoever was the aggressor originally, the quarrel had ended, the parties had separated, that the defendant had no cause to apprehend further danger, and that when he returned, after the lapse of sufficient time for the passions to cool, and without any new provocation, fired at the deceased, there existed in his mind a deliberate and premeditated design to effect his death. If it be conceded that the original quarrel was provoked by the deceased, and that the defendant was abused and assaulted as claimed, still the shooting was wholly unjustifiable. There being no longer any reason for the defendant to apprehend any bodily injury, his act in killing the deceased in the manner described by the witnesses for the People was murder within all the cases, and it was clearly a question of fact for the determination of the jury whether sufficient time had elapsed for the excited passions of the defendant to cool. (*Shorter v. People*, 2 N. Y. 193; *People v. Sullivan*, 7 id. 396; *People v. Kelly*, 113 id. 647; *People v. Carlton*, 115 id. 618.)

It may be true that the defendant left the saloon, procured the pistol, returned and fired the fatal shot while smarting and angered by reason of the insults and blows of the deceased, but these facts constitute in law no excuse or justification for the killing. So long as there was time and opportunity for reason to assume its sway and the passions to cool the law holds the defendant responsible for his acts. It may be that the language and conduct of the deceased provoked the original quarrel in the saloon, but after that difficulty had terminated the defendant

returned to renew it, and, instead of avoiding further trouble, as was his duty, deliberately sought out the deceased and shot him, as the jury found, from motives of revenge. It is not now within the province of the court to disturb the verdict of the jury on the ground that the deceased was the aggressor in the beginning. The courts, in the administration of criminal justice, are bound by settled legal rules. If their effect and operation should be mitigated in a particular case by reason of special facts or circumstances, that power rests with the executive department of the government and not with the judicial tribunals. There are some features of this case that deserve, and doubtless will receive, careful consideration in that department. (*People v. Fish*, 125 N. Y. 136.)

There are no other questions disclosed by the record that call for further discussion, or that would justify a new trial, and the judgment of conviction must, therefore, be affirmed.

All concur.

Judgment affirmed.

Swan v. State, 4 Humph. 136; *Riley v. State*, 9 Humph. 646; *Com. v. Drum*, 58 Pa. St. 9; *People v. Bealoba*, 17 Cal. 389; *People v. Nichol*, 54 Cal. 211; *People v. Williams*, 43 Cal. 344; *State v. Foster*, 61 Mo. 549; *State v. Kring*, 64 Mo. 591; *State v. McCormack*, 21 S. E. 693; *Carlton v. State*, 61 N. W. 699; *State v. Umble*, 22 S. W. 378.

NOTE.—Statutes generally make such a killing, when done with a premeditated design “to effect the death of the person killed,” murder in the *first degree*.

Minn. Stat. 1894, Sec. 6437; N. Y. Penal Code, Sec. 183; *State v. Norwood*, 20 S. E. 712; *People v. Sliney*, 33 N. E. 150; *People v. Rohl*, 33 N. E. 933; *People v. Rohl*, 138 N. Y. 616.

(2²) To kill another than the one killed.

JENNINGS *v.* COMMONWEALTH.

Court of Appeals of Kentucky, 1891.

16 S. W. 348.

PRYOR, J. The appellant, Jennings, was indicted in the Harlan Circuit Court for the murder of John Bailey. The indictment

ment contained two counts,—the first a conspiracy and an agreement with one Wilson Howard to murder Bailey, and the second an ordinary count for murder. On motion of the accused, and by the consent of the Commonwealth, the case was sent to the Laurel Circuit Court for trial, and a verdict and judgment rendered finding the accused guilty, and fixing his punishment at imprisonment for life. After the change of venue, and when the case was first called for trial, on motion of the attorney for the State the indictment was quashed, and the charge referred to the grand jury of Laurel county under that provision of the statute providing that, if the indictment be quashed, * * * a new indictment may be found from time to time by a grand jury of the county to which the removal is made, and prosecuted * * * as though the offence had been committed in that county. Gen. St. c. 12, art. 4, sec. 7. The grand jury of Laurel county returned an indictment with two counts,—the first charging a conspiracy on the part of the accused with Howard to murder Bailey, C. B. Turner, and George Turner; the second count being the usual charge of murder, by shooting Bailey. The defence denied the jurisdiction of the Laurel court for many reasons, only one of which is necessary to be considered. He had not only consented to a change of venue to Laurel county, but on his motion the change was made, and with it the indictment and order showing that fact. It is insisted by counsel that the offence charged against the accused by the grand jury of Laurel is a different offence from that embraced in the indictment found in the Harlan Circuit,—the one charging a conspiracy with Howard to kill and murder Bailey, and the other a conspiracy with Howard to murder Bailey and the two Turners. Each indictment, however, contained a count charging the accused with the murder of Bailey. It is manifest under our constitution and laws that the grand jury of Laurel county had no power to indict the accused for the crime of murder or manslaughter committed by him in the county of Harlan; and it is only by reason of the statute—the indictment being found in the proper jurisdiction—that the accused is given the right to change the venue in his case, that he may have a fair and an impartial trial. John S. Bailey was the person murdered by some one in the county of Harlan. The cause of that killing alone was the subject of in-

vestigation by both the grand jury of Harlan and that of Laurel county. One found a conspiracy with Howard to murder Bailey, and the other a conspiracy to murder Bailey, C. B. Turner, and George Turner. If on the trial of the last indictment the State had failed to connect the conspiracy with the purpose to murder the two Turners, but had established the conspiracy to murder Bailey, and that it was carried into execution, it will not be argued that the accused must go acquitted because of a variance between the charge contained in the indictment and that made out by the State. It is the same offence,—that of killing John S. Bailey. The accused was in no wise misled by this charge, or called on to answer any other offence than that of murdering Bailey; and we have been unable to see why the first indictment was set aside, and the case referred again to the grand jury. It is true, the testimony connects the accused with Howard, and a purpose to kill the Turners; but this would not have prevented a conviction upon an ordinary indictment for the murder of Bailey on the facts before us. Objection was made to the testimony or statement of a witness showing that Alex Bailey had been killed the Sunday preceding the Tuesday upon which Bailey was shot. The court told the jury that it was incompetent upon the question of the guilt of the accused for the murder of Bailey, and in fact it was developed by the same testimony, that Howard, who seems to have been the leading spirit in these murders, had been tried and acquitted of the offence of murdering Alex Bailey; and this evidence, therefore, was more beneficial than prejudicial to the accused, because it showed that his accomplice or co-conspirator had been acquitted; and besides, the court said to the jury that the witness had only referred to the time of the shooting of Alex Bailey, so as to enable him to fix the time or day on which John Bailey was killed, and they could consider it in no other light. The indictments both contained plain counts charging the accused with the murder of the deceased, and on the testimony there can be but little doubt as to his guilt.

The court properly refused to continue his case. It had been once continued after its removal to Laurel, and we are satisfied the accused had a fair trial. His own testimony condemns him. It is true, doubtless, that the accused did not know the man that

was shot. He says he was a stranger to John S. Bailey, and it may be that Howard was also, and still Bailey was cruelly murdered by them, and without any apparent cause. He had left his home, many miles from the residence of Middleton, the county judge of Harlan, where the shooting occurred, and in company with Howard was passing through the county, both armed with needle-guns, carried either for their own protection or for the purpose of murdering their enemies. They were at Mt. Pleasant on the Sunday that Alex Bailey was shot, and on the Tuesday following were both at the residence of the county judge, Middleton, for the purpose, as the accused says, of surrendering to the officers of the law, having been charged with committing other offences. They were, as Jennings says, on a mission of peace, and not in pursuit of blood. This unfortunate man who was shot lived many miles distant from where his brother was killed on the Sunday before. He was on his way to his brother's funeral, or for the purpose of bringing to punishment those who had murdered him. He stopped at Judge Middleton's for the night, and early in the morning, about sunrise, opened the door for some purpose, and while standing in the door the report of the needle or Winchester gun was heard, and the deceased fell, the ball passing entirely through his body. The firing was from the bushes, about 100 yards from the house of Middleton. Those in the house—the two Turners being among the number—went hastily to the spot from which the firing began, and there found from the tracks and other circumstances where two or more persons had been concealed. They found a small pouch, in which was a cooked chicken and other meats, with bread, supplied by these men no doubt in a sufficient quantity to last them while in the pursuit of blood. The parties were pursued who had been concealed in these bushes, and without knowing who they were; but after a short distance they found that Howard and the accused had passed but a few minutes in advance of them, each with his gun, and were then making rapid strides from the place of the murder. They were overtaken, and shots were fired by both parties, each fearing to approach the other, as all were armed, and Howard and the accused with long-range guns. They were not captured on that day, but made their escape. Jennings, the accused, says the shooting was done by Howard. That both had

gone to Middleton's for the purpose of giving themselves up for the murder of Alex Bailey, and, finding a good many persons at Middleton's house, they declined to make themselves known. That Howard left him, together with others, in the woods for a short time, when he heard the report of a gun, and on Howard's return he asked him if that was his gun, and his response was, "That is none of your business." So Jennings, from his statement, was entirely innocent of any wrong, or that any one had been shot, until he was overtaken by those at Middleton's and the firing began. It is shown by one or more witnesses for the defence that these two men said they were going to Judge Middleton's to surrender, but this entire proof is inconsistent with their conduct from the time they left their homes and started in pursuit of their victims. Jennings had heard that one of the Turners had abused his sister, and it is apparent that the accused, when shot, was supposed to be one of the Turners, or one of those against whom these parties entertained the most deadly hatred. This unfortunate man, Bailey, having no connection with these deadly feuds, while on his way to his brother's grave, was shot from ambush by either Howard or Jennings; and that both are equally guilty of the heinous crime there can be no doubt. He was murdered under the belief that he was one of the Turners, two of them being at Middleton's; and, while the punishment is severe, it is merited by reason of the gravity of the offence. The instructions were properly given, and contained the law of the case; and from the facts before us an error substantial in its character would have to appear in order to convince this court that the accused had been prejudiced by the finding of the jury or the judgment of the trial court.

The judgment below is affirmed.

Wareham v. State, 25 Ohio 601; *State v. Gilman*, 69 Me. 163; *Richards v. State*, 30 S. W. 805; *People v. Gordon*, 100 Mich. 518; *State v. Renfrow*, 20 S. W. 299, 111 Mo. 589; *Angell v. State*, 36 Tex. 542; *Butler v. People*, 125 Ill. 641; *State v. Smith*, 2 Strobbart 77; *State v. Levelle*, 13 S. E. 319; *State v. Payton*, 90 Mo. 220; *Bish. I.*, Sec. 328; *Clark*, p. 159; *Wharton*, Sec. 317; *Hawley & McGregor*, p. 35.

NOTE.—Statutes generally make such a killing, when done with a premeditated design "to effect the death of the person killed," murder in the first degree.

Minn. Stat. 1894, Sec. 6437; N. Y. Penal Code, Sec. 183.

NOTE.—Murder in the *second degree*. Most statutes make the killing murder in the second degree when committed with a design to effect the death of the *person killed*, or *another*, but without deliberation and premeditation.

State v. Young, 40 Pac. 659; McQueen v. State, 15 So. 824; Ezell v. State, 15 So. 810; State v. Crawford, 22 S. W. 371; Knowles v. State, 20 S. W. 829; People v. Hite, 33 Pac. 254; Minn. Stat. 1894, Sec. 6438.

NOTE.—By some statutes it is murder in the second degree to kill a person in a duel.

By the Minnesota statutes it is murder in the second degree, no matter whether the killing takes place within or without the State, if the duel is planned within the State; and the seconds or assistants are made equally guilty with the principals.

Minn. Stat. 1894, Sec. 6439; N. Y. Penal Code, Sec. 185.

(3²) To do great bodily harm.

STATE v. WALKER.

Supreme Court of Louisiana, 1885.

37 La. Ann. 560.

THE opinion of the court was delivered by

BERMUDEZ, C. J. The defendant appeals from a sentence of death passed on him on a prosecution and conviction of murder.

The record contains a bill of exception, a sworn motion for a new trial and another in arrest of judgment.

The bill recites as follows:

"The jury had retired for deliberation and returned into open court for instruction, and the foreman of the jury, Mr. W. E. Maples, stated to the court that one of the jury was not content, on the ground that, though satisfied that accused struck the blow which caused death, he was not satisfied that accused intended to kill; whereupon, his honor, Judge A. W. O. Hicks, presiding, briefly and distinctly charged the jury that 'when a blow is struck and death ensues, it is murder, and the intention has nothing to do with it;' and whereupon the foreman instantly delivered into court an unqualified verdict of 'guilty of murder, as charged.'

"To which instruction or special charge defendant, by his

counsel, instantly objected as contrary to the law or laws of Louisiana governing the case, and as depriving the jury of their capacity and jurisdiction to discriminate between excusable and felonious homicide, which points of objection were overruled by the court."

The district judge did not concur in this statement. He added:

"The above statement of the inquiry made by the juror and the instructions given by the court are not correct. The juror stated to the court that all the jury save one was ready to return a verdict of guilty of murder. That one juror was satisfied that defendant killed Cates, and that the killing was malicious, but was not satisfied that defendant intended to kill him and desired instructions on that point. The court did not tell the jury where a blow is struck and death ensues it is murder, and the intention has nothing to do with it.

"The court did charge the jury in answer to the juror, that the intent to kill was not necessary in the case, had nothing to do with the case.

"That the defendant was presumed to have intended the natural and probable consequences of his act. 1 Bish. sec. 735; 12 Ann. 628. If a mortal blow is unlawful and malicious, and death ensues, the perpetrator is guilty of murder; whether he intended to kill or not, he is responsible for the effects of such willful and malicious blow, although he did not intend to kill. 2 Bish. Cr. L. secs. 689, 679."

The district judge simply meant, and said, that intent need not be proved as a fact; that it might be presumed or inferred.

Those charges are sustained by the authorities to which reference is made, and by others besides. Wharton C. L. secs. 106, 107, and notes 112; note to secs. 107, 313, 315; 30 Mich. 16, *Weller v. People*.

The motion for a new trial on the ground of misconduct of the jury, is unaccompanied by any bill of exception with annexed evidence.

That, in arrest of judgment, is based on the ground that the judgment overruling the motion for a new trial is contrary to law and evidence.

It is sufficient to say that no showing is made justifying a review of the rulings of the district judge on those motions.

Judgment affirmed.

McKee v. State, 82 Ala. 32; Clem v. State, 31 Ind. 480; Wellar v. People, 30 Mich. 16; Brooks v. Com., 61 Pa. St. 352; Souther v. Com., 7 Gratt. 673; Com. v. Devlin, 126 Mass. 253; People v. Sanchez, 24 Cal. 17; State v. Moore, 25 Ia. 128; State v. Smith, 2 Strobbart 77; State v. Underwood, 57 Mo. 40; *Ex parte* Nettles, 58 Ala. 268; Clark, p. 160; Wharton, Sec. 315.

NOTE.—Many statutes make killings of this nature *murder in the third degree*.

Minn. Stat. 1894, Sec. 6440; State v. Smith, 56 Minn. 78.

(4²) To commit a felony.

STATE v. MURRAY.

Supreme Court of Missouri, 1895.

29 S. W. 590.

BURGESS, J. At the January Term, 1894, of the St. Louis County Circuit Court, the defendant, with his brother, James Murray, was indicted for murder in the first degree for the killing of Edgar Fitzwilliams. Counsel was assigned defendant, and at the May Term following, upon his application, a change of venue was awarded him to the Circuit Court of Gasconade county, where at the September Term, 1894, of that court, he was put upon his trial, and convicted of murder in the first degree, and now prosecutes his appeal to this court, in which he is not represented by counsel. The facts, as disclosed by the record, are as follows: On the night of December 23, 1893, defendant, his brother James, and two others met and arranged to rob the conductor of a car on Page avenue, in St. Louis county. When the car passed back on one of its return trips from the city of St. Louis, and not far from the end of the car track, Edgar Fitzwilliams, who was the conductor in charge, and Lizzie Schueble, a passenger, were its only occupants. The four negroes boarded the car, James Murray and one other getting on the front or west end, the defendant and the other negro getting on the rear end. By prearrangement between them, when the conductor was assaulted, one of the party who was in the rear end of the car was to pull the trolley line, and thereby extinguish

all the lights. When the conductor, Fitzwilliams, went in the car to collect the fares, one of the three negroes who were at that time inside the car shot and killed him, and then they robbed him of what money he had upon his person, and his watch, and then made their escape. Miss Schueble, who was on the car at the time, witnessed the killing and robbery, having, as soon as it occurred, left the car, and given the alarm to some persons in the neighborhood, and when the car was reached by such persons, within a very few minutes thereafter, Fitzwilliams was found in the car dead. The murder was committed in St. Louis county. The defendant made one written statement, and three other different statements, to as many different persons, in which he admitted his presence at the time of the killing and robbery; that he boarded the car knowing the arrangement to rob the conductor; that he was present to perform his part; but denied further than this his participation in the crime. He was sworn as a witness in his own behalf, and testified upon his trial to substantially the same facts in regard to his connection with the murder that he had stated on the other occasions. After defendant and his brother James had been arrested, and were in custody of the officers of the law in the city of St. Louis, Miss Schueble went to see them, and recognized James Murray as one of the negroes who robbed and killed Fitzwilliams, and was of the opinion that defendant was another of them, but was not positive; but when taken into her presence the defendant stated, in the presence and hearing of the officer then having him in custody, that she was the lady that was on the car at the time. After defendant's conviction, he in due time filed his motion for a new trial, which, after due consideration by the court, was overruled, but he saved no exceptions to the court's action in this regard. There is, then, nothing before this court to be passed upon except the record proper, as he must, by his failure to except to the ruling of the court and to save his exceptions, be deemed to have waived any possible objections thereto and to have acquiesced therein. *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *State v. Hitchcock*, 86 Mo. 231; *State v. McDonald*, 85 Mo. 539; *State v. Pints*, 64 Mo. 317.

After careful examination of the indictment, we are satisfied that it is sufficient, and in form often met with the approval of this court. It contains every averment necessary to constitute

murder in the first degree, the offence for which defendant was convicted. *State v. Blan*, 69 Mo. 317; *State v. Burns*, 99 Mo. 472, 12 S. W. 801; *State v. Sundheimer*, 93 Mo. 316, 6 S. W. 52; *State v. Turlington*, 102 Mo. 647, 15 S. W. 141; *State v. Stacy*, 103 Mo. 12, 15 S. W. 147; *Whart. Hom.* (1st Ed.) 269; *Whart. Prec. Ind.* (3d Ed.) 114. The facts, as disclosed by the record, show a preconcerted plan by defendant and his co-conspirators to rob the conductor of the car, and that, in doing so, they killed and murdered him for the small amount of money which he then had in his possession, and defendant's connection therewith and participation therein. His guilt was established beyond any doubt, and it is impossible to see how the jury could have arrived at any other conclusion than that of his guilt. He seems to have had a fair and impartial trial, and the judgment must be affirmed.

All concur.

People v. Wilson, 145 N. Y. 628; *Hoffman v. State*, 59 N. W. 588; *Reg. v. Serne*, 16 Cox C. C. 311; *People v. Olsen*, 80 Cal. 122; *State v. Barrett*, 40 Minn. 77; *Oliver v. State*, 17 Ala. 587; *People v. Braloba*, 17 Cal. 389; *People v. Vasquez*, 49 Cal. 560; *Moynihan v. State*, 70 Ind. 126; *Com. v. Pemberton*, 118 Mass. 36; *State v. Smith*, 32 Me. 369; *Buel v. State*, 78 N. Y. 492; *Dolan v. People*, 64 N. Y. 485; *Ruloff v. People*, 45 N. Y. 213; *People v. Johnson*, 110 N. Y. 134; *People v. Greenwall*, 115 N. Y. 520; *Minn. Stat.* 1894, Sec. 6440; *Clark*, p. 160.

(c¹) Resulting from the resistance of lawful arrest.

SNELLING v. THE STATE.

Supreme Court of Georgia, 1891.

87 Ga. 50; 13 S. E. 154.

CLARKE, J. At a Special Term of Randolph Superior Court held in July, 1890, Sam. Snelling, the plaintiff in error, was convicted of the murder of Ed. Skipper. He moved for a new trial, setting forth as the only grounds of such motion that the verdict was contrary to the evidence and contrary to the law. The motion was denied, and its denial is the error here assigned.

The evidence introduced by the prosecution was substantially as follows: In 1884 a bench-warrant was issued from the Superior Court of Randolph county for the arrest of said Snelling for murder, he having been indicted in that court for such offence. On May 17th, 1887, the sheriff placed this warrant in the hands of the deceased for the purpose of execution. He is mentioned in the evidence as "a bailiff of the county," "officer of the justice court here—arresting officer," and jailer of the county. Shortly after nine o'clock in the morning of that day, Skipper left Cuthbert to make the arrest, being accompanied by Joe Standley and N. A. Burge. Their interest in the matter was to secure a reward which had been offered for the apprehension of Snelling. These men were all armed, Skipper and Burge each having a double-barrel shot-gun, and Standley a Winchester rifle. Skipper took one route for the house where Snelling was supposed to be, and Standley and Burge another. The three met at the house. This was simply a single room with a front and rear door, and a window in one end. The house was "pretty high" above the ground, and steps led up to the front door which opened toward the inside. Skipper took position at the front door, Burge at the rear door, and Standley at a corner which commanded a view both of the front door and window. Skipper three times ordered that the door be opened. The only response was from a little girl who said there was "nobody in there." "He then caught hold of the door-knob, turned it and pushed, and the door flew open." After the door opened he entered the house and said to Snelling, "Get up and consider yourself under arrest." When these words were spoken, Snelling fired a pistol at Skipper, the ball of which entered his stomach. Standley then ran to the door and sprang into the house. As he did so, the pistol was fired a second time, and Snelling and Skipper then had hold of each other. The latter's gun was on the floor with the barrel pointing to the door. Skipper cried, "Help, he has killed me." Standley made an ineffectual effort to use his gun, when Snelling fired at him, shooting him in the shoulder. This disabled Standley so that his gun fell to the floor. It fired as it fell. Snelling then shot at Standley a second time, inflicting another wound, and then again, the last time missing his aim. Standley was still unable to discharge his gun, though "he cocked it once

or twice and snapped it." Snelling was still "snapping" his pistol at Standley. He turned to the door and let himself down. Here Burge came up, and some dozen words were exchanged between him and Standley. About this time Skipper fell backwards out of the door. At the same time Snelling leaped through the door and fled. Skipper neither spoke nor moved after he fell. He expired in five minutes. Upon examination it appeared that his gun had not been fired. When the shooting occurred, the only person in the house besides the three men was a negro girl about nine or ten years old. No evidence was tendered on the part of the defendant. He made a statement which was, in substance, that on the occasion in question he was asleep in his wife's house, that the noise of some one breaking into the house awoke him, that the first thing he saw was a man in the house presenting a gun at him, that he thereupon shot at the man, that the man again presented the gun and defendant again shot, that about this time another man entered with a gun, that neither of the men said anything to him, and that what he did was for his own protection. He mentioned further that he did not know how many shots he fired, and that he escaped after he had fired the last one. The State having introduced a witness who testified that defendant had told him that Skipper had shot him, defendant, with a double-barrel shot-gun before he fired at all, defendant made a supplemental statement in which he said that he was shot in the difficulty, and with buckshot, and pointed out to the jury the place where he was struck.

Under the evidence the most favorable view of the case for the defendant is, that he killed a private citizen who was attempting to arrest him for the commission of a felony. This view may well be taken, for the officer did not disclose his character as such, and did not exhibit or mention the warrant which he had. Supposing the facts to be thus, is there anything to relieve the defendant of the guilt of murder? We think not. A private person had a legal right to make the arrest. "If the offence is a felony, and the offender is escaping, or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion." Code, Sec. 4724. This defendant's offence was a felony for which he had been indicted three years before. Nor could he shield himself from the effect of the situa-

tion by a claim that he acted in ignorance of the purpose of the person attempting the arrest. This purpose was distinctly announced by the first and only words which were addressed to him by the deceased. This evidence cannot be overcome and needs no support. If it needed aid, it could well receive it from the circumstances of the defendant when the killing occurred. He was in the county where the felony had been perpetrated, and there as a fugitive from justice. He must have apprehended the very thing which occurred, and might reasonably have supposed the attack on his home to have been made with that design. It is easy to believe that he did at once realize the intention of the arresting party. The response of the little girl to the demand for admission to the house is significant in this connection. The state of preparation in which he was found and the promptness and vigor with which he availed himself of such preparation mean much in explaining the state of his mind. If, then, Skipper as a private citizen had authority to apprehend the defendant, and the defendant knew that Skipper's purpose was to arrest him, it was, of course, his duty to submit. The law would not tolerate in him any form or degree of resistance, and most certainly we cannot discover the slightest excuse for the sanguinary and fatal resistance to which he did resort.

The following decisions of this court were cited by counsel for defendant, to wit: *O'Connor v. The State*, 64 Ga. 125; *Phillips v. The State*, 66 Ga. 755; *Davis v. The State*, 79 Ga. 767; and *Croom v. The State*, 85 Ga. 718. We have examined in full each one of these cases, and fail to find any adjudication at variance with this opinion. Indeed, the one last named states more strongly and clearly than the writer can the doctrines upon which we rest the present decision.

Judgment affirmed.

State v. Spaulding, 34 Minn. 361; *Vroom v. State*, 85 Ga. 718; *Clark*, p. 161; *Wharton*, Sec. 413.

NOTE.—Definition of probable cause.

People v. Kilvington, 104 Cal. 86; *People v. Carlton*, 115 N. Y. 618.

(2¹) Manslaughter.

Manslaughter is the unlawful killing of a human being without malice aforethought. The act may be voluntary or involuntary.

(a¹) Voluntary.

Voluntary manslaughter is where death occurs by reason of an act done designedly, in passion roused by provocation or in resisting an unlawful arrest.

(1²) In passion roused by provocation.

STATE v. CURRY.

Supreme Court of North Carolina, 1854.

1 Jones Law, 280.

THIS was an indictment for murder, tried before his Honor, Judge Caldwell, at the Spring Term, 1854, of Northampton Superior Court.

The prisoner and the deceased, both free persons of color, started from Gaston to ascend the Roanoke River in a loaded boat, assisted by a slave, the deceased being the manager. After rowing up the river three-quarters of a mile, they were heard quarreling by a witness then about one hundred and fifty or two hundred yards behind them in another boat. When the witness first heard them quarreling, the prisoner was standing in the bow, and the deceased in the stern. The witness stated that their boat was gaining on the boat in which the prisoner and deceased were; the latter was somewhat drifting with the current. During the quarrel, and when within about a hundred yards of the other boat, he saw the prisoner striking at some one in the bottom of the boat, at which time it was drifting, and continued to drift toward them; that the deceased so being stricken was near the

stern, a little in advance of the point where he first saw him; that the prisoner continued striking until the boats were so near together that he could discover that it was the person of the deceased on whom the blows were being inflicted; that he was lying on his back with his legs across a pushing pole, and that the prisoner continued the blows, giving the deceased five or six after he ascertained who it was.

The witness also stated that the weapon used by the prisoner, while beating the deceased, was what is called a boat-slide; that it was about eight feet long and three and a half inches wide, and two and a half inches thick, and had iron on each side near the ends; that he went into the boat where the deceased was lying, and washed the blood off his head and face, and said to the prisoner, "You have killed Harris," to which he replied, "Damn him, he is only drunk." The witness then asked the prisoner why he had done so, and he replied the deceased had stricken him first. The witness did not see the parties when they first engaged. The same witness testified, as did three others who saw the prisoner immediately after the occurrence, that there was a bruise or puncture on the cheek of the prisoner, and that it was bleeding.

This witness also testified that the pushing pole, over which the legs of the deceased were hanging, was some fifteen feet long, had iron on its end, and was broken off at the end at which the iron was. The jailer testified that the prisoner was committed to jail a short time after the occurrence, and that he had a bruise or cut over one of his eyes, and said that it was caused by blows given him by the deceased. The deceased died about twenty-four hours after the occurrence. Several witnesses who examined the deceased, before and after his death, stated that his arms were bruised, and one of them broken; that his skull was badly fractured—that there was blood on the brain, after the bones of the skull were removed; and that his head was bruised and bloody all over.

The counsel for the prisoner insisted that the testimony only made out a case of manslaughter, for that there was evidence that the deceased had stricken the prisoner two blows in the first instance.

His honor charged the jury that the weapon used by the pri-

soner was a deadly one, and that even supposing that the prisoner had been stricken by the deceased, as insisted by his counsel, still, if they believed from the testimony that the prisoner knocked down the deceased with the boat-slide in the rencontre, and, when the deceased was so down, continued to beat him from the time when first seen striking, up to the time when the two boats came together; that with the deadly weapon described, he bruised and wounded him to the extent deposed to by those who examined the body of the deceased, that it would be a case where the violence inflicted was out of all proportion to the provocation, and would be murder on the part of the prisoner.

The counsel for the prisoner then moved the court to charge the jury that if the prisoner and the deceased entered into the contest upon equal terms, and, during the rencontre, the prisoner killed the deceased, it would be but manslaughter on the part of the prisoner.

The court thereupon told the jury, that the general principle laid down by the counsel, all malice apart, was correct; but it did not apply to this case; for even supposing the prisoner to have entered into the conflict upon equal terms, yet, if he knocked down the deceased, and continued to beat him with the weapon described, and in the manner and to the extent testified to by the witnesses, it would be murder on the part of the prisoner.

Under these instructions, the jury, by their verdict, found the prisoner guilty.

Rule for a *venire de novo*; for error in the instructions given the jury. Rule discharged, and appeal to the Supreme Court.

PEARSON, J. If two men fight upon a sudden quarrel, and one be killed, it is but manslaughter, although the death is caused by the use of a deadly weapon.

But if, in such case, the killing be committed in an unusual manner, showing evidently that it is the effect of deliberate wickedness—malice, not passion, it is murder, although there be a high provocation.

It is well settled that this is the general rule and the exception. His honor was of opinion that the case under consideration fell within the exception, and the prisoner was guilty of murder. There is error.

From the manner in which the case was put to the jury, the prisoner is entitled to the benefit of every inference that the jury were at liberty to draw in his favor; for, his honor took the case from the jury, and instructed them that in the most favorable point of view, the prisoner was, according to the evidence, guilty of murder.

The facts, then, are to be taken to present this case: Two free negroes start for the purpose of carrying a boat up the river; in a short time they get into a quarrel: one seizes a pole fifteen feet long, the other a slide, or a piece of plank eight feet long; the deceased gives the first blow, by a stroke or push with the pole (which has an iron spike at the end), making a bruise or puncture on the cheek of the prisoner, and a bruise or cut over one of his eyes; the pole is broken by being struck against the side or bottom of the boat; the prisoner gives the deceased a blow with the slide on his head, by which he is knocked down upon the bottom of the boat; after he is down, the prisoner continues to strike with the slide many times; how many times he struck cannot be determined; the deceased died twenty-four hours afterward. A witness says he continued to strike from the time the boats were one hundred and fifty yards apart, until they got near enough to see that he was striking at deceased in the bottom of the boat—one boat floating down the stream, and the other passing up to meet it. An examination of the body shows that "the arms were bruised, and one of them broken. The skull was fractured, and there was blood over the brain. The head was bruised and bloody all over."

Suppose the arm was broken by one blow, the skull by another which knocked the deceased down upon the bottom of the boat; this natural evidence, furnished by the state of the body, about which there can be no mistake, for it is not under the influence of the imagination, shows that there could not have been many other blows inflicted, and the evidence can only be reconciled by supposing that after the deceased was down in the bottom of the boat, not more than one out of ten of the blows made with a plank eight feet long, could take effect upon the body of the deceased. So, the force of most, if not all the blows, stricken after the deceased was down, must have been spent upon the sides or bottom of the boat.

We must here observe, that the fact the prisoner continued to strike with the slide, after the deceased was lying in the bottom of the boat, and did not punch or job with the end, which was the only way in which the slide could then have been used with deadly effect, tended strongly to show that he was acting under the blind fury of passion, caused not merely by the provocation of a blow, but by the excitement of a fight.

Assuming these to be the facts, the question is, does the case fall within any exception, so as to be murder, and not manslaughter? Take a general view of the subject. If two men upon a sudden quarrel, get into a fist fight, and one, without giving notice, draws a knife, and stabs the other to the heart, or blows his brains out with a pistol, it is manslaughter, because, out of regard to the frailty of our nature, the killing is supposed to be the effect of passion, brought on by the high excitement of the fight. Does the case under consideration, where both parties seize upon weapons not prepared beforehand, but of a most unwieldy kind, and continue to use the same weapons throughout the conflict, bear any comparison in regard to its enormity with the cases of manslaughter stated above?

To go more into particulars: In order to make the proper application of a rule of law, it is necessary to reflect and see upon what principle the rule is founded, although there be a great provocation, if the presumption that the party acted under it is rebutted, and it be shown that he acted from malice, the killing is murder. *State v. Johnson*, 1 Ired., 354; *State v. Martin*, 2 Ired. 101. If one puts his adversary to death in an unusual manner, the fact of his going out of the usual way, shows that he acted deliberately, and not under the impulse of passion, which always moves straightforward. Such deliberation shows malice. This is the principle (and it is founded in our nature) upon which the exception is made. For instance, two men upon a sudden quarrel, engage in a bloody fight, and are separated; whereupon, one of them proposed to "drink as friends," and contrived to put poison in the cup of his adversary: this is murder; for, although there is great provocation, and the thing is done instantly, while the blood flows and the wounds continue to smart, still, it was not done in the way that passion influences men to act, and shows deliberate wickedness of heart, which amounts to

malice. 1 Hale, 453. So, if two persons fight, and one of them overpowers the other, and then puts a rope around his neck, and strangles him, it is murder. "The act is so willful and deliberate, that nothing can justify it." *Rex. v. Shaw*, 25 E. C. L. 443.

On the other hand, we will state two other cases which were held not to come within the exception—upon a sudden quarrel, the prisoner pushed the deceased down; he got up and struck the prisoner several blows in the face with his fist; the prisoner pushed him down again, and stamped him upon the belly and stomach two or three times, and as he was getting up, kicked him in the face, "the blood came out of the mouth and nose of deceased, he fell backwards, and died the next day." Held to be manslaughter. *Ayes' case*, 1st Russel 496.

Upon a sudden quarrel, two draw their swords and fight, the prisoner runs his sword through the body of the deceased, and after he fell, took him by the nape of the neck, dashed his head upon the ground, and said, "d—n you, you are dead." *Jenner, B.*, told the jury this was only manslaughter; but the jury were disposed to find it murder, because of the dashing of the head against the ground; but *Allison, J.*, repeated to them that it was manslaughter only, and they found accordingly. *Watters' case*, 12 State Tri. 113. The cases put above of one who, after engaging in a fist fight, without notice, stabs his adversary to the heart with a knife, or blows his brains out with a pistol, are as strong, if not stronger, than either of the two; and the principle is established, that where there is a strong provocation, and the violence is but the natural and usual effect of passion excited to the highest pitch, the killing is but manslaughter. We, therefore, think his honor erred in holding that the prisoner's case came within the exception, and that he ought to have instructed the jury that it was manslaughter only; for there was a strong provocation, greatly excited by the exchange of blows, and the many blows given, or attempted to be given, while the deceased was lying on the bottom of the boat, were but the natural and ordinary effect of blind passion or *furor brevis*, as the books call it. Under such circumstances, a man is not expected to count his blows or note their violence.

The general rule is, that a killing upon legal provocation is manslaughter. There is a second exception—if the provocation

be slight, or as Foster calls it "trivial," and the killing is done with a degree of violence out of all proportion to the provocation, it is murder. The exception is made upon the ground, that as the provocation was slight, such excessive violence cannot be attributed to it, and must proceed from wickedness of heart: malice, not passion. This exception, as a matter of course, only applies where the provocation is slight; for, if the provocation be great, the violence cannot be out of all proportion to it. Accordingly, Foster, in his Crown Law, 291 and 292, expressly confines it to "cases of homicides upon slight provocation;" and for illustration, refers to several cases. A., finding a trespasser upon his land, knocks his brains out with a hedge stake. This is murder, because of the excess of violence. A parker found a boy stealing wood. He bound him to his horse's tail and beat him: the horse took fright, ran off, and dragged the boy on the ground, so that he died. This was held to be murder. The judges laid much stress upon the fact, that the boy come down out of the tree as soon as he was bid, and made no resistance. So the provocation was slight. Crown Cases, 131.

the breast with a pummel of his sword. The woman fled. He the breast with a pummel of his sword. The woman fled. He pursued and stabbed her in the back. "Holt was at first of opinion that this was murder. A single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear." But, afterwards, it appearing that the woman had struck the soldier in the face with an iron patten, and drew a great deal of blood, it was held clearly to be no more than manslaughter. This case, and the others put by Foster, show conclusively, that the exception we are now considering, only applies to cases where the provocation is slight. His honor, in the first part of the charge, held, that the prisoner's case fell within the exception, and failed to advert to the fact the doctrine was not applicable, because there was strong provocation, and the excitement of a fight.

There is a third exception. If one, having the right to chastise, as a parent or master, exceeds the bounds of moderation, the killing, although he did not intend to kill, will be manslaughter, as a general rule. The exception is, that if the measure of the punishment, or the instrument used, is "likely to kill, due regard

being always had to the age and strength of the party, the offence is murder." Foster, 262. As where a master corrected his servant with an iron bar, and a schoolmaster stamped on a scholar's belly, so that they died. 4 Blackstone, 199.

This exception has no bearing upon the case before us, but we thought it proper to state it, in connection with the two others, so that the whole might be presented, and the dividing line, between the three exceptions to the general rule in regard to manslaughter, might be distinctly marked.

1st. Where there is strong provocation, if the killing is done in an unusual manner, it is murder.

2nd. Where there is but slight provocation, if the killing is done with an excess of violence, out of all proportion to the provocation, it is murder.

3rd. Where the right to chastise is abused, if the measure of chastisement or the weapons used be likely to kill, it is murder.

We were induced to enter thus fully into the subject, for the purpose of explaining some general remarks that fell from the court in the opinion delivered in the case of *State v. Jarratt*, 1st Ired., 86, which (as we suppose) misled the learned judge who tried the case below, by confounding the distinction between the 1st and 2d exceptions, so as to put a case of strong or "grievous" provocation upon the same footing with one where the provocation was slight and "trivial."

Judgment reversed.

Venire de novo.

Ex parte Warrick, 73 Ala. 57; *Smith v. State*, 83 Ala. 26; *Collins v. U. S.*, 150 U. S. 62; *State v. Kloss*, 117 Mo. 591; *Ayres v. State*, 26 S. W. 396; *State v. Berkley*, 109 Mo. 665; *McDuffie v. State*, 17 S. E. 105; *State v. Scott*, 36 W. Va. 704; *Rex v. Hayward*, 6 Car. & P. 157; *McManus v. State*, 36 Ala. 285; *Slaughter v. Com.*, 11 Leigh (Va.) 681; *Reese v. State*, 90 Ala. 624; *Maher v. People*, 10 Mich. 212; *People v. Freel*, 48 Cal. 436; *Davis v. People*, 114 Ill. 86; *State v. Matakwich*, 59 Minn. 514; *Clark p.* 165; *Bishop II.*, Sec. 697; *Wharton*, Sec. 304; *Hawley & McGregor*, p. 143; *The Penal Code of Pa.*; *Shields*, vol. II., 961-963.

NOTE.—Acts which will inflict bodily harm or cause great insult are sufficient provocation.

Schlect v. State, 75 Wis. 486; *Clark*, p. 168; *Wharton*, Sec. 470; *Hawley & McGregor*, p. 145.

NOTE.—By the Minnesota statutes all homicides not murders, nor justifiable or excusable, are manslaughters.

Minn. Stat. 1894, Sec. 6444; N. Y. Penal Code, Sec. 188.

NOTE.—The Minnesota code makes all killings occurring in heat of passion, but in a cruel and unusual manner, by means of a dangerous weapon, manslaughter in the first degree.

Minn. Stat. 1894, Secs. 6445, 6447; N. Y. Penal Code, Sec. 189.

NOTE.—Cooling time. If time elapses *sufficient* for the passion to cool, it is murder though the passion has not subsided.

McNeil v. State, 15 So. 352; State v. Savage, 78 N. C. 520; State v. Holmes, 40 Pac. 735; Maher v. People, 10 Mich. 212; State v. Hill, 4 Dev. & B. 491; Bishop II., Sec. 711; Wharton, Sec. 480.

(2²) In resisting an unlawful arrest.

PEOPLE v. BURT.

Supreme Court of Michigan, 1883.

51 Mich. 199; 16 N. W. 378.

CAMPBELL, J. Respondent, having been convicted of murder, was sentenced to twenty years' imprisonment, and brings error. The attorney general, on careful consideration of the case, has concluded that he cannot uphold the conviction. We are of the same opinion. But inasmuch as we are to consider whether the prisoner should be retained for further trial or discharged, we are compelled to deal with it far enough to determine that question.

Respondent is charged with murdering one Martin Van Etter on the 18th of October, 1867. The complaint and warrant for his arrest were made in January, 1879,—between eleven and twelve years afterwards. The testimony showed that he could have been reached at almost any time during this interval, and no good reason was shown for any delay. As his defence consisted partly of proof that he was at that time in a different part of the State, and his identification depended chiefly on testimony of a witness very strongly interested in clearing himself from a bad case of wrongdoing under color of zeal for the public service, the delay was at least unfortunate in rendering testimony of so stale a transaction unsafe.

Without going over all the facts an outline of the principal matters will be enough to explain our legal views. Some burglaries having been recently committed at Williamston, in Ingham county, where respondent had been doing business, one Carr, who was a constable of Ingham county, undertook, with Van Etter's co-operation, to see what they could discover on the subject. They had no indications or suspicions, well or ill-founded, pointing toward any person as the criminal. They procured revolvers and stationed themselves by a bridge near Fowlerville in Livingston county, with the purpose of compelling passers-by to submit to a search, expecting thereby to get at indications of guilt in somebody. The person who killed Van Etter, and who is claimed to have been respondent, having, while passing along the highway, reached the bridge, was stopped, against his remonstrances, by these parties, and they endeavored to compel him to accompany them to Fowlerville—as Carr claims—to be searched. He warned them off once or twice if not oftener, and charged them with designing to rob him. Carr claims to have informed him of the burglaries and to have also told him that he was showing guilt in the matter. Having kept a few paces in advance of them,—they following him with weapons, and Van Etter's pistol, if not Carr's, being cocked,—he attempted to evade them by running off southward across the ditch, and when about twenty feet off he whirled round and fired and shot Van Etter through the bowels. Van Etter fired at him, the shots being nearly simultaneous. Carr fired several shots after him, and thought he hit him.

In order to make the act of the assailant murder, the prosecution undertook to show that he was resisting or evading a lawful arrest, and to do so they were allowed to prove the burglaries, and the subsequent action of Carr and his associate as based on probable cause. At least, no other reason can very well be suggested for allowing such proof.

Carr, when acting out of his own county, was not vested with official character. But no one, whether private person or officer, has any right to make an arrest without warrant in the absence of actual belief, based on actual facts creating probable cause of guilt. Suspicion without cause can never be an excuse for such action. The two must both exist, and be reasonably well founded.

We need not now go further,—although we may perhaps say that no one can be justified in threatening or taking life in attempting an arrest on suspicion, without incurring serious responsibilities. And where the life of an actual felon is taken by one who does not know or believe his guilt, such slaying is murder. A private citizen has less immunity than an officer. But we need not discuss their respective rights or liabilities, because neither Carr nor Van Etter were proceeding on any honest belief or well-founded suspicion. Except in the lack of specific intention to rob they in no way differed from any highway wrongdoers, and their appearance would justify any one in believing them to be dangerous criminals. Any serious injury done by them could hardly fail to be a felony.

The proof of the Williamston burglaries was therefore improper, because defendant was not on trial for them, and because his attempted arrest was not warranted by any honest and well-founded supposition of his complicity in them.

From the facts as detailed by Carr himself we are strongly inclined to think he made out a case of justifiable homicide. But whether this was absolutely shown or not, the case should have been put to the jury on that hypothesis, and if they thought that Van Etter was killed by a person who believed his own safety to be in peril from Carr and Van Etter's lawless violence, the respondent should have been acquitted on that ground.

This, however, is now immaterial, because even if the homicide was voluntary, there can be no doubt that, having been provoked by unlawful violence and the display of deadly weapons to compel submission to a wrongful arrest, the killing could not be more than manslaughter; and it should have been so held.

The conviction was erroneous, and the judgment must be vacated. And inasmuch as, if respondent had been indicted for manslaughter, the prosecution would have been outlawed, he should not be subjected to another trial but should be discharged. Inasmuch as the attorney general has appeared in this case, we can pay no attention to suggestions from other parties, and as we have no doubt the papers before us are substantially correct, it would not be just to postpone the decision.

The other justices concurred.

Drennan v. People, 10 Mich. 169; *Croom v. State*, 85 Ga. 718; *State v. Scheele*, 57 Conn. 307; *Creighton v. Com.*, 84 Ky. 103; *Rafferty v. People*, 69 Ill. 111; *Roberts v. State*, 14 Mo. 138; *State v. Levelle*, 13 S. E. 319; *Clark p.* 169; *Bishop II.*, Sec. 699; *Hawley & McGregor*, p. 147.

(b¹) Involuntary.

Involuntary manslaughter is where death is caused by the doing of an unlawful act neither a felony nor dangerous to life or a lawful act improperly, but without the intention to take life.

(1²) In the doing of an unlawful act.

Misdemeanor.

WELLAR *v.* THE PEOPLE.

Supreme Court of Michigan, 1874.

30 Mich. 16.

CAMPBELL, J.

Plaintiff in error was convicted of the murder of Margaret Campbell by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death she had been out on an errand of her own in the neighborhood, and on coming back into the house entered the front door of the bar-room, and fell, or was knocked down upon the floor. While on the floor there was evidence tending to show that Wellar ordered her to get up, and kicked her, and that he drew her from the bar-room through the dining-room into a bedroom, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and if not, then by a blow or kick afterwards. All of the testimony is not re-

turned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of Wellar's; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is that a theory was put to the jury on which they were instructed to find as murder what would, or at least might be manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge from the charge, the prosecution claimed the fatal injury came from a blow of Wellar's fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof, that the injury was visible when she was in the bar-room, and that the principal dispute was as to how it was caused, whether by a blow, or kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time if inflicted before the prisoner dragged her into the bedroom. It does not appear from the case at what hour she died.

It may be proper to remark that while it is not desirable to introduce all the testimony into a bill of exceptions in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this we cannot fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include.

Upon any of the theories presented, there is no difficulty in seeing that if Wellar killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate intentional slaying to any thing below one of the degrees of murder.

But it is claimed that, although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and properly should, have con-

sidered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found by careful inspection of the charge, that the court specifically instructed the jury, that if Wellar committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide committed with a deadly weapon to that degree of crime. And in this connection the charge further given that if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted willfully and maliciously in doing the injury necessarily led to a conviction of murder, because there was no pretence of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime. And in determining whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended, must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either perilling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one

of a very serious character which might naturally and commonly involve loss of life or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults, is, an intent to do "grievous bodily harm." Carr. Sup., p. 237. And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, if death followed, the result would not necessarily have been murder.—*Ibid.* Our own statutes have made no provision for rendering assaults felonious, unless committed with a dangerous weapon, or with an intent to commit some felony. Comp. L., ch. 244.

In general, it has been held that where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence, is not conclusive in either way, but where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent the ruling has been otherwise. In *State v. McNab*, 20 N. H., 160, it is held that unless the unlawful act of violence intended was felonious, the offence was manslaughter. The same doctrine is laid down in *State v. Smith*, 32 Maine, 369. That is the statutory rule in New York and in some other States.

The willful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent. See 2 Bish. Cr. L., secs. 680, 681. But where the weapon or implement used is not one likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose. See *Turner's Case*, 1 Raym., 144, where a servant was hit on the head with a clog; *State v. Jarrott*, 1 Ired., 76, where the blow was with a hickory stick; *Holly v. State*, 10 Humph., 141, where a boy threw a stone; *Rex v. Kelly*, 1 Moody, C. C., 113, where it was uncertain whether a person was killed by a blow with the fist, which threw him on a brick, or by a blow from a brick, and

the court held it a clear case of manslaughter. In *Darry v. People*, 10 N. Y., 120, the distinctions are mentioned and relied upon, and in the opinion of Parker, J., there are some remarks very applicable. In the case of *Com. v. Webster*, 5 Cush. R., 295, the rulings of which have been regarded as going beyond law in severity, this question is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected from the strength of the parties and the purpose of fighting till one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to manslaughter, unless death is intended. 1 East, P. C., 270; *Murphy's Case*, 6 C. & P., 103; *Hargrave's Case*, 5 C. & P., 170.

The case of *Commonwealth v. Fox*, 7 Gray, 585, is one resembling the present in several respects, in which the offence was held to be manslaughter.

The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent willfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely. But it was certainly open to him to claim that, whatever may have been the cause of death, he did nothing which was designed to produce any serious or fatal mischief, and that the injury from which the deceased came to her death was not intentionally aimed at a vital spot, or one where the consequences would be probably or manifestly dangerous. We have no right to say that there was no room for a verdict of manslaughter, and the effect of the charge was to deny this.

Most of the other questions are of such a nature that, if arising on another a trial, they will be presented in a more guarded form. We have no doubt it is proper to show the previous relations of Wellar and the deceased, and that they may be of more or less

importance in explaining conduct and motives. We are also inclined to think it would not be incompetent to show the physical strength of the respective parties. It is objectionable, however, to prove these things by evidence of specific acts, especially where inferences might be drawn unfavorable to the prisoner's character, which would not be relevant to the charge. These inquiries should be general, and not leading, and should not, where it can be avoided, introduce irrelevant matter.

We also think it was not correct practice to compel the defence, instead of the prosecution, to call the witness Malladay. It appeared that he was one of two persons present at the occurrence for which Wellar was on trial, and it further appeared that his name was endorsed on the information as one of the people's witnesses, so that he was not unknown to the prosecution. It devolves on the prosecutor in a case of homicide, to connect the prisoner with the injury which is claimed to have been the cause of death, and to give all the testimony in his power going to the proof of the *corpus delicti*. The fact that the name of a witness is endorsed on the information, does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined. *Rex v. Simmonds*, 1 C. & P., 84; *Rex v. Beezley*, 4 C. & P., 220; *Reg. v. Bull*, 9 C. & P., 22; *Reg. v. Bodle*, 6 C. & P., 186; *Reg. v. Vincent*, 9 C. & P., 91; *Rex v. Harris*, 7 C. & P., 581. But in cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous. If there is any other admissible reason, none has yet been passed upon, and none has been presented which could apply to the case before us. If some one were to come forward and assert his presence when he had not been seen or noticed by others, there might be room for questioning his position. But where there is no doubt or dispute as to the fact of presence, no such question can arise, and the only objection then will be that he may not be favorable to the prosecution. But this is no answer, any more than it would be if a subscribing witness stood in a similar position. As explained in *Hurd v. People*, 25 Mich., 406, and in the English cases there referred to, a public prosecutor is not a plaintiff's attorney, but a sworn min-

ister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. *Reg. v. Ball*, 8 C. & P., 745; *Reg. v. Chapman*, 8 C. & P., 558. By this means, and by laying all the facts before the jury, they are quite as likely to get at the truth as if he were allowed to impeach the witnesses who disappoint him. Any intelligent jury will readily discover whether a witness whom the prosecutor has been compelled to call is fair or adverse, and can make all proper allowance for bias, or any other influence which may affect his credit. If there is but a single eye witness, he could not be impeached, and yet the danger of falsehood is quite as great, and the chances of its correction much less than where there are two, and both are called. And if such a witness need not be called by the prosecution, the defence cannot impeach him, and must either call him, and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts.

The judgment must be reversed, and a new trial granted. The respondent to be remanded to the custody of the sheriff of Saginaw county.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, CH. J., did not sit in this case.

Adams v. State, 65 Ind. 565; *Rex v. Sullivan*, 7 Car. & P. 641; *People v. Stubenvoll*, 62 Mich. 329; *Reg. v. Towers*, 12 Cox C. C. 530; *Pool v. State*, 87 Ga. 526; *Yundt v. People*, 65 Ill. 372; *People v. Olmstead*, 30 Mich. 431; *Lee v. State*, 1 Cold. 62; *State v. Center*, 35 Vt. 378; *Reg. v. Knock*, 14 Cox C. C. 1; *Clark* p. 172; *Wharton*, Sec. 305.

CODE.—Many statutes make an unintentional killing, occurring in the doing of a misdemeanor, manslaughter in the first degree.

Minn. Stat. 1894, Sec. 6445; N. Y. Penal Code, Sec. 189.

NOTE.—Some statutes make the willful killing of an unborn quick child, by an injury committed on the person of the mother of such child, manslaughter in the first degree.

Minn. Stat. 1894, Sec. 6446; N. Y. Penal Code, Sec. 190; Clark, p. 179.

NOTE.—Many statutes make any one causing the death of a woman by inducing her to take any drug to secure the miscarriage of the woman, unless given to preserve her life, guilty of manslaughter.

Minn. Stat. 1894, Sec. 6447; N. Y. Penal Code, Sec. 191; Clark, p. 174.

(2²) In the doing of a lawful act improperly.

(a²) Negligence.

STATE *v.* O'BRIEN.

Supreme Court of New Jersey, 1867.

3 Vroom. 169 (32 N. J. L.).

(Ante, page 65.)

Reg. *v.* Chamberlain, 10 Cox C. C. 486; Reg. *v.* Dant, 10 Cox C. C. 102; People *v.* Slack, 90 Mich. 448; Johnson *v.* State, 94 Ala. 35; Rice *v.* State, 8 Mo. 561; State *v.* Hardister, 38 Ark. 605; State *v.* Hardie, 47 Ia. 647; Clark, pp. 175-176; Bishop L., Sec. 217; Wharton, Sec. 305.

NOTE.—Most statutes make death resulting from culpable negligence in the performance of a legal act manslaughter in the second degree.

Minn. Stat. 1894, Secs. 6451, 6457; N. Y. Penal Code, Sec. 193.

NOTE (b³).—Self defence.

Runyan *v.* State, 57 Ind. 80; Erwin *v.* State, 29 Ohio St. 186.

NOTE (c³).—Chastisement.

Powell *v.* State, 67 Miss. 119, 6 So. 646; Regina *v.* Griffin, 11 Cox C. C. 402; Clark, p. 174.

NOTE (d³).—Arrest.

Doherty *v.* State, 53 N. W. 1120.

b.

Mayhem.

Mayhem at common law is the act of willfully depriving another of such members as will render him less able "To defend himself or annoy his enemies." By statute any act of disfiguring constitutes the crime.

KITCHENS v. THE STATE OF GEORGIA.

Supreme Court of Georgia, 1888.

80 Ga. 810; 7 S. E. 209.

THOMAS J. KITCHENS was indicted for the offence of mayhem. The material parts of the indictment were as follows:

"For that the said Thomas J. Kitchens, on the 30th day of May, in the year 1887, in the county aforesaid, did then and there, unlawfully and with force and arms, willfully and maliciously injure, wound and disfigure the private parts of one Janie Toler, the said Janie Toler then and there being a female, with intention then and there to disfigure said private parts by then and there with a certain knife cutting said private parts."

The State and the accused having announced ready for trial, before the case went to the jury the accused demurred to the indictment:

1. Because the offence charged could not be committed on a female.

2. Because there was no sufficient specification of the nature and character of the injury inflicted.

3. Because of a failure to negative the fact that the injury inflicted did not amount to castration, and thus negative the proviso or exception contained in the section of the code under which said indictment is had.

The demurrer was overruled, and defendant was convicted. He excepted to the judgment overruling the demurrer.

BLECKLEY, C. J. 1. "Mayhem shall consist in unlawfully depriving a person of a member, or disfiguring or rendering it useless." Code, sec. 4339. "If any person shall unlawfully, and without sufficient cause or provocation, cut out or disable the tongue, put out an eye, slit or bite the nose, ear or lip, or cut or bite off the nose, ear or lip, or castrate, or cut, or bite off, or disable any other limb or member of another, with intention in so doing to maim or disfigure such person, or shall voluntarily, maliciously, and of purpose, while fighting or otherwise, do any of these acts, every such person shall be guilty of mayhem." *Id.* sec. 4340. Section 4341 prescribes the penalty for cutting out or disabling the tongue; section 4342, for putting out an eye; section 4343, for putting out both or the only eye; section 4344, for slitting or biting the nose, ear or lip; section 4345, for cutting or biting off the nose, ear or lip; section 4346, for castration. Then section 4347 declares: "A person convicted of willfully and maliciously injuring, wounding or disfiguring the private parts of another, with the intention aforesaid, whilst fighting or otherwise, which injury, wounding or disfiguring do not amount to castration, shall be punished," etc. The question is, whether the private parts of females are protected against wounding or disfiguring, or whether the protection extends to males only. The military or combative importance of the organ injured or destroyed, to which the old common law had special regard, is of no significance whatever as a constituent of mayhem under our code. Whether capacity for attack or defence has been lessened by the maiming, is utterly immaterial and irrelevant. The code looks not to fighting, to giving and shunning blows, but to maintaining the integrity of the person, the natural completeness and comeliness of the human members and organs, and the preservation of their functions. It is certain that as to every specific organ or member designated by name as the subject of mayhem, both sexes are included; then, why are not both included under the terms, "private parts of another?" It is true that the male alone has the testicles, and only upon him could the statute be violated by castration; but will that difference, or any other difference in the private parts of the two sexes, warrant a construction of these terms, either to the effect that the female has no private parts, or that they are less sacred than those of the

male? Each sex has private parts appropriate to its own functions; this we know as a matter of fact, and cannot ignore it in exploring legislative intention. It would be simple nonsense for us to hold that in contemplation of law a female has no private parts. And why should we conclude that, having them, they are less protected by law against being injured, wounded or disfigured than those of the male? Whether for the sake of utility or appearance, hers are as much within the letter and spirit of the statute as his. There is no better reason for protecting by penalties the genital organs of a man than those of a woman. We think they are both equally included in the section of the code we are construing.

2. In alleging that the person injured was a female, the indictment by necessary implication negatives castration. No injury could be committed upon a woman which would amount to castration.

3. The indictment was not bad because the nature and character of the injury were not more particularly described. An indictment is sufficient which describes the offence in the language of the code, or so plainly as to be easily understood by the jury. Code, sec. 4626. Here the indictment used the very words of the code in stating the offence, and setting forth the acts constituting it.

What we have said disposes of the case, and the result is that the court did not err, but decided correctly, in sustaining the indictment and overruling the demurrer.

4. We deny the motion to dismiss the writ of error because the evidence was not brought up. The sole error alleged was in overruling the demurrer. The evidence could be of no use in reviewing the judgment disposing of the demurrer, and hence if found in the record here, would be a mere excrescence and encumbrance. The irrelevant, if felt at all, is always in the way. To have to think of it is a needless tax upon attention. It is best for the record to contain no superfluous matter, and if any, the less the better.

Judgment affirmed.

State v. MaFoo, 110 Mo. 7, 19 S. W. 222; *State v. Brown*, 60 Mo. 141; *Godfrey v. State*, 63 N. Y. 207; *High v. State*, 26 Tex. App. 545; *State v. Cody*, 18 Or. 506; *People v. Wright*, 93 Cal. 564; *State v. Ailey*, 3 Heisk. Tenn. 8; *Clark*, p. 182; *Wharton*, Secs. 581, 583; *Bishop II.*, Secs. 1001-1008; *Bishop I.*, Sec. 547; *Hawley & McGregor*, p. 167.

NOTE.—Some jurisdictions require a specific intent to disfigure.

Minn. Stat. 1894, Sec. 6462; N. Y. Penal Code, Sec. 206; *State v. Jones*, 70 Ia. 505; *State v. Hair*, 37 Minn. 351; *State v. Cody*, 18 Or. 506; *People v. Wright*, 93 Cal. 564; *Clark*, p. 183; *Hawley & McGregor*, p. 168.

NOTE.—In some jurisdictions, if the party so far recovers by the time of trial that there is no longer any disfigurement or disability, no conviction can be had.

Minn. Stat. 1894, Sec. 6466; N. Y. Penal Code, Sec. 210.

Contra.—*Slattery v. State*, 41 Tex. 619.

NOTE.—Maiming to escape performance of duty, or to excite sympathy in order to secure alms, are felonies in some States.

Minn. Stat. 1894, Secs. 6463, 6464; N. Y. Penal Code, Secs. 207, 208.

C.

Assault.

An assault is an attempt with force and violence to inflict corporal injury upon another, accompanied with the apparent means to carry the attempt into effect.

PEOPLE v. LEE KONG.

Supreme Court of California, 1892.

95 Cal. 666; 30 Pac. 800.

GAROUTTE, J. Appellant was convicted of the crime of an assault with intent to commit murder, and now prosecutes this appeal, insisting that the evidence is insufficient to support the verdict.

The facts of the case are novel in the extreme, and when applied to principles of criminal law, a question arises for determination upon which counsel have cited no precedent.

A policeman secretly bored a hole in the roof of appellant's building, for the purpose of determining, by a view from that

point of observation, whether or not he was conducting therein a gambling or lottery game. This fact came to the knowledge of appellant, and upon a certain night, believing that the policeman was upon the roof at the contemplated point of observation, he fired his pistol at the spot. He shot in no fright, and his aim was good, for the bullet passed through the roof at the point intended; but very fortunately for the officer of the law, at the moment of attack he was upon the roof at a different spot, viewing the scene of action, and thus no substantial results followed from appellant's fire.

The intent to kill is quite apparent from the evidence, and the single question is presented, Do the facts stated constitute an assault? Our criminal code defines an assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another." It will thus be seen that to constitute an assault two elements are necessary, and the absence of either is fatal to the charge. There must be an unlawful attempt, and there must be a present ability, to inflict the injury. In this case it is plain that the appellant made an attempt to kill the officer. It is equally plain that this attempt was an unlawful one. For the intent to kill was present in his mind at the time he fired the shot, and if death had been the result, under the facts as disclosed, there was no legal justification to avail him. The fact that the officer was not at the spot where the attacking party imagined he was, and where the bullet pierced the roof, renders it no less an attempt to kill. It is a well-settled principle of criminal law in this country, that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggressor at the time, the criminal attempt is committed. Thus an attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offence to the same degree as if he had money or other personal property which could be the subject of larceny. (*State v. Wilson*, 30 Conn. 500; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *People v. Moran*, 123 N. Y. 254.)

Having determined that appellant was guilty of an unlawful attempt to kill, was such attempt coupled with the present

ability to accomplish the deed? In the case of *People v. Yslas*, 27 Cal. 633, this court said: "The common-law definition of an assault is substantially the same as that found in our statute." Conceding such to be the fact, we cannot indorse those authorities, principally English, which hold that an assault may be committed by a person pointing in a threatening manner an unloaded gun at another; and this, too, regardless of the fact whether the party holding the gun thought it was loaded,* or whether the party at whom it was menacingly pointed was thereby placed in great fear. Under our statute it cannot be said that a person with an unloaded gun would have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be. It was held in the case of *State v. Swails*, 8 Ind. 722, that there was no assault to commit murder where A fires a gun at B at a distance of forty feet, with intent to murder him, if the gun is in fact loaded with powder and a slight cotton wad, although A believes it to be loaded with powder and ball. The later Indiana cases support this rule, although in *Kinkle v. State*, 32 Ind. 230, the court, in speaking of the Swail's case, said: "But if the case is to be understood as laying down the broad proposition that to constitute an assault * * * with intent to commit felony the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval." In the face of the fact that the statute of this State in terms requires that in order to constitute an assault the unlawful attempt and present ability must be conjoined, *Kinkle v. State*, 32 Ind. 230, can have no weight here. In *State v. Napper*, 6 Nev. 115, the court reversed the judgment upon the ground that the people failed to prove that the pistol with which the assault was alleged to have been made was loaded, and that consequently there was no proof that the defendant had the present ability to inflict the injury.

It is not the purpose of the court to draw nice distinctions between an attempt to commit an offence and an assault with intent to commit the offence, for such distinctions could only have the effect to favor the escape of criminals from their just deservings. And in view of the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no object in carrying the discussion of the subject to any greater lengths.

In this case the appellant had the present ability to inflict the injury. He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. That the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part; neither did the officer escape by reason of the fact of his being so far distant that the deadly missile could do him no harm. He was sufficiently near to be killed from a bullet from the pistol, and his antagonist fired with the intent of killing him. Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for his act, and causes the act to be no less an assault. These acts disclose an assault to murder as fully as though a person should fire into a house with the intention of killing the occupant, who fortunately escaped the range of the bullet. (See *Cowley v. State*, 10 Lea, 282.) The fact that the shots were directed indiscriminately into the house rather than that the intended murderer calculated that the occupant was located at a particular spot, and then trained his fire to that point, could not affect the question. The assault would be complete and entire in either case. If a man intending murder, being in darkness and guided by sound only, should fire, and the bullet should pierce the spot where the party was supposed to be, but by a mistake in hearing the intended victim was not at the point of danger, but some distance therefrom, and yet within reach of the pistol-ball, the crime of assault to commit murder would be made out; for the unlawful attempt and the present ability are found coupled together. If appellant's aim had not been good, or if through fright or accident when pointing the weapon or pulling the trigger, or if the ball had been deflected in its course from the intended point of attack, and by reason of the occurrence of any one of these contingencies the party had been shot and killed, a murder would have been committed. Such being the fact, the assault is established.

The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired, is immaterial upon this question. That

element of the case does not go to the question of present ability, but pertains to the unlawful attempt.

Let the judgment and order be affirmed.

PATERSON, J., concurred.

HARRISON, J., concurring. I concur in the judgment, upon the ground that upon the evidence before them the jury have determined that the unlawful attempt of the defendant was coupled with a present ability—that is, an ability by the means then employed by him in furtherance of such attempt—to commit murder upon the policeman.

Smith v. State, 39 Miss. 521; State v. Mooney, Phil. (N. C.) 434; People v. Yslas, 27 Cal. 631; Balkum v. State, 40 Ala. 671; State v. Davis, 1 Ired. 125; State v. Crow, 1 Ired. 375; People v. Lilley, 43 Mich. 521; Chapman v. State, 78 Ala. 463; Johnson v. State, 35 Ala. 363; Clarke v. State, 89 Ga. 768; Carr v. State, 20 L. R. A. 863; People v. Foss, 80 Mich. 559, 8 L. R. A. 47; State v. McAfee, 107 N. C. 812, 10 L. R. A. 607; Com. v. White, 110 Mass. 407; Com. v. Stratton, 114 Mass. 303; Clark, pp. 198, 199; Bishop II., Secs. 22-62; Wharton, Sec. 603 *et seq.*; Hawley & McGregor, p. 297; The Penal Code of Pa.; Shields, vol. I., 190, 219, 243, 306, 407, 444-462, 499.

NOTE.—Consent is a defence to the assault, unless the assault and battery would constitute a breach of the peace.

Com. v. Collberg, 119 Mass. 350; State v. Hartigan, 32 Vt. 607; State v. Bagan, 41 Minn. 285; Clark, p. 216; Wharton, Sec. 636; Hawley & McGregor, p. 40.

NOTE.—Aggravated assaults are those accompanied with circumstances of aggravation, such as assaults with intent to kill, to commit rape, and to inflict serious bodily injury. To constitute these crimes a *specific intent* is essential.

Though these crimes are only assaults at common law, they are in some States made distinct crimes by statute, and in others, the intent to commit a felony being present makes the degree of the assault higher.

N. Y. Penal Code, Sec. 217; Minn. Stat. 1894, Sec. 6471; Clark, p. 202.

NOTE.—When one assaults another with intent to kill or commit a felony, with loaded firearm or other deadly weapon, or administers, or causes to be administered to him a poisonous drug, it is an assault in the first degree.

Minn. Stat. 1894, Sec. 6471; State v. Dineen, 10 Minn. 407; Boyd v. State, 4 Minn. 321; N. Y. Penal Code, Sec. 217.

NOTE.—When one causes any such act to be performed or drug to be administered, not for the purpose of death or accomplishment of a felony, it is assault in the second degree.

Minn. Stat. 1894, Sec. 6472.

NOTE.—Any other assault is assault in the third degree.

Minn. Stat. 1894, Sec. 6473.

NOTE.—Justifiable and excusable assaults and batteries. One commits a justifiable assault who opposes violence with force, and the limit to his privilege to do this is that he must not apply a force not called for in self defence (a). Nor use violent force in repelling slight force (b). Nor take life unless life and limb are in danger (c). And by retreating he cannot avoid such extremity (d).

(a) *Fisher v. Bridges*, 4 Blackf. 518; *Philbrick v. Foster*, 4 Ind. 442; *Dole v. Erskine*, 35 N. H. 503; *Adams v. Waggoner*, 33 Ind. 531.

(b) *State v. Wood*, 1 Bay. 351; *Hazel v. Clark*, 3 Har. 22 (Del.).

(c) *Grainger v. State*, 5 Yerg. 459; *U. S. v. Wiltberger*, 3 Wash. C. C. 515.

(d) *Creek v. State*, 24 Ind. 151; *Oliver v. State*, 17 Ala. 587; Minn. Stat. 1894, Sec. 6477.

Clark, p. 213; Wharton, Sec. 628; Hawley & McGregor, p. 135.

NOTE.—A man may defend his family with the same force that he may himself (a), and his real property (b) and personal (c) with an equal force; save that he cannot take life in defence of property aside from his home. Such acts of defence are justifiable though under other circumstances they would constitute assaults and batteries.

(a) *Com. v. Malone*, 114 Mass. 295; *Patten v. People*, 18 Mich. 313; *State v. Greer*, 22 W. Va. 800-819; *Wilson v. State*, 30 Fla. 234.

(b) *Parsons v. Brown*, 15 Barb. 590; *Drysdale v. State*, 83 Ga. 744.

(c) *Souther v. State*, 18 Tex. App. 352; *Anderson v. State*, 6 Bax. 608; *Filkins v. People*, 69 N. Y. 101; *Com. v. Donahue*, 148 Mass. 529; *People v. Pearl*, 76 Mich. 207; *State v. Black*, 109 N. C. 856; Clark, pp. 213, 214; Wharton, Sec. 621; Hawley & McGregor, p. 135.

d.

Robbery.

“Robbery is larceny from the person or personal presence by force and violence, or putting in fear.”

(1) *The taking must be from the person or personal presence.*

CLEMENTS v. STATE OF GEORGIA.

Supreme Court of Georgia, 1890.

84 Ga. 660; 11 S. E. 505.

SIMMONS, J. 1. William and Charles Clements were indicted, tried and convicted of robbery. They made a motion for a new trial upon several grounds, which was overruled by the court, and they excepted. The evidence as to the robbery was, in substance, as follows: Between seven and eight o'clock on the evening of January 19th, 1888, Bird went into his smoke-house to weigh out rations for his hands. While he was in there, a man ran up and said that the first one who put his head out, he would shoot it off; said that they were after a murderer that had killed four men in Dooly county, and were told he was there. Bird asked what was his name, and the man said he did not know but the sheriff did, and that the place was surrounded. Bird looked through the crack, the room being built of logs, and the man was standing with his face toward Bird, who could not tell anything about him only he was a stout man, and he stood in a shooting position. After a little while, the man disappeared, “kinder backed off,” and Bird waited until he thought it was time for a man to come from anywhere around in fifty or sixty yards, and he did not come; and Bird said, “I am going out, if you do shoot,” and went out. When he got to the back door, he met his wife coming in from the kitchen, and she asked him if he knew his chest was gone, and he told her no. Before that man came up, a gun was fired off. The chest was right under the bed, which stood at the front door of Bird's dwelling-house. There

was a piazza running along by the front door, and the chest had been taken out by that door. The smoke-house was "sorter back" of that house. The bed was from one and a half to two feet from the front piazza. The chest could have been seen under the bedstead. It was under the bed when Bird went to the smoke-house. It contained, before it was broken open, several hundred dollars in currency, land deeds and papers. He was alarmed or dazed by the statement made while he was in the smoke-house, by the man on the outside, who was standing within eight feet with his gun in a shooting position, so he could not put his head out. The smoke-house was about fifteen steps from the dwelling-house. Nobody said anything to him about taking his money, and nobody took anything from his person. The chest was not very heavy. It was about 18 inches long and about 14 inches high. It was generally known that he kept his valuables in that chest. There was other evidence tending to show that the plaintiffs in error were the guilty parties; but it is unnecessary to detail it here, as the main question is whether, under the facts set out, the offence was robbery.

Under the above stated facts, the court charged the jury as complained of in the 3d and 4th grounds of the motion for a new trial, which is alleged by the plaintiffs in error to be erroneous. These grounds are as follows: 3. Because the court erred in the following charge to the jury: "In order to convict these defendants, it must appear that the goods alleged to have been taken were taken from the person of the owner. By this you are not to understand that the goods must have been in the hands of, or attached to, the person of the owner. All his property, so far as cases of this character are concerned, is, in contemplation of law, upon the person of the owner, which is, at the time of taking, in the immediate presence of the owner, or is so near at hand, or stored in such position, that, at the time of taking, it is under the immediate personal protection of the owner. If the goods are in that condition, then they are, within the contemplation of the law, upon the person of the owner." 4. Because the court gave the following charge: "That goods stored in the dwelling-house are deemed to be upon the person of the owner, in contemplation of law, so far as cases of this character are concerned, when the owner thereof is either personally

therein, that is, in his dwelling-house, or in any house so nearly adjacent thereto as that the whole is under his immediate personal dominion and control. If you shall find from this evidence that in the county of Coffee, upon the day named in the indictment, the goods alleged to have been stolen were the property of Wiley Bird; that they were of some value; that they were stored in the dwelling-house of the owner; that the owner thereof was present therein, or in a house so nearly adjacent thereto as that the same was under his immediate protection, dominion and control; that the defendants, acting in concert, intending by violence or intimidation to take and carry away the goods described in the indictment, and by threats of violence putting him in fear within the meaning of that term as the court has defined it to you, and by this means overcame his will; and that while under the influence of such fears the other entered the dwelling-house of the owner and took and carried away the goods described, with the intent to steal the same, then it would be your duty to convict them, even though it should appear that at the exact moment of taking the owner had no knowledge that his goods were being taken or of the purpose of the defendants in their putting him in fear." We do not think the court erred in giving the charges complained of, under the facts of this case. It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner, but it is sufficient if it is taken in his presence. *Crews and Crenshaw v. State*, 3 Coldw. 350; *State v. Jenkins*, 36 Mo. 372; 2 *Russell on Crimes*, p. 106, 107; 2 *Roscoe Crim. Ev.* p. 935, 936. In the present case, Bird, the prosecutor, was in his smoke-house, within fifteen steps of the dwelling-house which contained the chest. All the property in this dwelling-house, in contemplation of law, was in his immediate possession and control. He was found by the defendants in this smoke-house, and was prevented by threats and intimidation from leaving the smoke-house and going into his dwelling-house. He was kept in the smoke-house a sufficient length of time to enable some of the defendants to enter the dwelling-house and take the chest therefrom. Suppose the defendants had found Bird on the front steps of his piazza and had carried him by force to this smoke-house and locked him therein, and had then gone back to his house and stolen his chest; could

it be said that the taking was not in his presence? Suppose they had found him in his dining-room, and locking him therein, had gone to the front room and taken the chest; would not that have been in his presence? Suppose the owner of cattle is out in the pasture with them, when a man comes up and points a pistol at him, telling him to stay where he is. At the same time, confederates of the aggressor drive the cattle off from another part of the field. Would not that be a taking in the presence of the owner? See 2 East P. C. 707. In the case of *State v. Calhoun*, lately decided by the Supreme Court of Iowa, the accused went into the dwelling-house of a lady and into the room where she was, and by violence and intimidation, throwing her down and tying her, extorted information as to where her valuables were. Being told that they were in another room, he left her tied and went into the other room, where he got her money and watch. This was held to be a taking in the presence of the owner, notwithstanding it occurred in a different part of the house from that in which the owner was tied. 72 Iowa, 432, s. c. 2 Am. St. Rep. 252. Bishop, in his work on Criminal Law, vol. 2, sec. 1177, says: "The meaning of this legal phrase is, not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that will suffice. Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the personal presence extends." In the case of *Merriman v. The Hundred of Chippenham*, 2 East P. C. 709, it was held that, where a wagoner was forcibly stopped in the highway by a man under fraudulent pretence that his goods were unlawfully carried for want of a permit, and while they were going to a magistrate to obtain the permit, the man's confederates took away the goods, this was sufficient proof of a taking to constitute robbery. See also same case quoted in 3 Greenl. Ev. sec. 228. So we think that where the prosecutor was within fifteen steps of the property stolen, and was kept away by threats and intimidation by one of the defendants, while the other stole the chest, the taking was in the presence of the prosecutor.

2. The verdict was found by the jury upon the proper count in the indictment, and the evidence authorized the finding.

Judgment affirmed.

State v. Calhoun, 72 Ia. 432; Hope v. People, 83 N. Y. 418; Brown v. State, 33 Neb. 354; Minn. Stat. 1894, Sec. 6478; Clark, p. 284; Bishop II., Sec. 1156; Wharton, Sec. 874; Hawley & McGregor, p. 233.

(2) *Force and violence must be used in securing possession of the property.*

THOMAS v. THE STATE.

Supreme Court of Alabama, 1891.

91 Ala. 34; 9 So. 81.

MCCLELLAN, J. The indictment in this case is substantially in the form prescribed by the Code for the offence of robbery, and is sufficient. Code, p. 276, Form 76; Chappel v. State, 52 Ala. 359.

The evidence on the trial was without conflict, to the effect that the possession of the property, the subject-matter of the alleged robbery, was obtained from the prosecutor by artifice, and without violence, or putting in fear; and that after the possession had been thus peaceably obtained, it was retained, and the property carried away, by putting the prosecutor in such fear as prevented any effort on his part to regain it. The bill of exceptions sets forth that the prosecutor and his brother, aged respectively fifteen and thirteen years, the former having a gun, met three men, including the defendant, in a road or street in the suburbs of Birmingham. "Two of the men passed on, while the defendant stopped, and engaged in conversation with Robert Yarborough (the prosecutor), in regard to purchasing the gun that said Robert Yarborough had in his hand. Said Yarborough voluntarily handed the gun to the defendant for examination, in obedience to the request of the defendant to be allowed to examine it; and the said defendant conversed with said Robert Yarborough about five minutes in regard to the gun, inquiring how the said gun was operated, and whether it was loaded. Being informed that the gun was loaded, the defendant then stepped back about ten steps, and said to Yarborough, 'Run, or I will shoot you,' pointing the gun at him." Yarborough did not run,

but was frightened, and backed off some distance; and the defendant then ran away with the gun. The jury found the defendant guilty of robbery, and he was adjudged and sentenced accordingly. The rulings of the court on charges requested for the defendant were to the effect, that these facts constituted robbery; and whether they did or not, is the main inquiry arising on this appeal.

The authorities are well nigh uniform to the position, that the violence, or putting in fear, which is an essential element of the crime of robbery, must precede, or be concomitant with the act by which the offender acquires the possession of the property. The offence is against both the person, and against property. In so far as it is against the person, it consists in personal violence, or personal intimidation. In so far as it is against property, it consists of manucaption *animo furandi*. If there be violence, or putting in fear, however aggravated, without a taking and asportation of property, there may be an assault, or assault and battery, or an assault with intent to rob, but no robbery. On the other hand, if there be a taking by trick or contrivance, and carrying away with felonious intent, but no violence, or putting in fear, as a means of the caption of another's property, there is a larceny, but no robbery. *Com. v. James*, 1 Pick. (Mass.) 375. The three essential elements of the offence are, felonious intent, force, or putting in fear, as a means of effectuating the intent, and, by that means, a taking and carrying away of the property of another from his person, or in his presence. In the nature of things, all these elements must concur in point of time, else the act done is not rounded out to the full measure of the capital felony. If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains the possession. If putting in fear is relied on, it must be the fear under duress of which the possession is parted with. The taking, as it has been expressed, must be the result of the force or fear; and force or fear which is a consequence, and not the means of taking, will not suffice. "The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else, the offence is not robbery." 2 Bish. Cr. Law, sec. 1175. "It may also be observed," says Archbold, "with respect to the taking, that it must not, as it should seem, precede the

violence, or putting in fear, or rather, that a subsequent violence, or putting in fear, will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery." 2 Archbold Cr. Pr. & Pl. p. 1289; also, 2 Russell on Crimes, p. *108; 1 Hale P. C. 534. "It must appear," says Roscoe, "that the property was taken while the party was under the influence of the fear; for, if the property be taken first, and the menaces or threats inducing the fear be used afterwards, it is not robbery." Roscoe's Crim. Ev. p. 924. And Mr. Wharton recognizes the same doctrine. 1 Whar. Cr. Law, sec. 850.

The adjudged cases fully support these texts. In an early case, the facts were, that the prisoner desired the prosecutor to open a gate for him, and, while he was so doing, the prisoner took his purse. The prosecutor, seeing it in the prisoner's hand, demanded it, when the prisoner answered: "Villain, if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country, as I did John Somers," and then went away with the purse; and because he did not take it with violence, or put the prosecutor in fear, it was ruled to be larceny, and no robbery, for the words of menace were used after the taking of the purse. *Rex v. Harman*, 1 Hale's P. C. 534. See, also, *Rex v. Grey*, 2 East's P. C. 708; and *Rex v. Gnosil*, 1 Car. & P. 304, in which it is said by Garrow, B.: "To constitute the crime of highway robbery, the force used must be either before, or at the time of the taking." In the case of *Shinn v. State*, 64 Ind. 13, it appeared that an accomplice of the defendantsnatched money from the prosecutor, and handed it to the prisoner, who attempted to make off with it, but was pursued and overtaken by the prosecutor, when a tussle ensued between all three of them for the possession of the money. Mere snatching property from another is by all the authorities not robbery. Hence, in this case, the force had to be predicated of the tussle, which occurred after the defendant had acquired the possession. It was held, that force thus used subsequent to the taking, in an effort to retain the wrongful possession acquired by snatching, was not such force as is essential to the crime of robbery. The court said: "The evidence tended to show the fraudulent and felonious obtaining of money from the prosecuting witness by means of a

previously arranged trick or contrivance, but did not sustain the charge of robbery contained in the indictment;" citing *Huber v. State*, 57 Ind. 341; and to like effect is the case of *Hanson v. State*, 43 Ohio St. 376.

"Robbery," says the Supreme Court of Arkansas, "is defined to be a felonious taking of money or goods from the person of another, or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the stealing." *Clary et al. v. State*, 33 Ark. 561. And the same doctrine is held substantially in the following cases: *People v. McGinty*, 24 Hun, 62; *State v. Jenkins*, Mo. 372; *State v. Deal*, 64 N. C. 270; *State v. John*, 69 Amer. Dec. 777; *State v. McCune*, 70 Amer. Dec. 176, notes 178.

We have discussed this point more at large than we should otherwise have done, because we are constrained, in following the very numerous authorities that have been cited, there being none outside of this State to the contrary, it is believed, supporting, as they clearly do, the sound doctrine in this connection, to overrule a case decided by this court in 1875, in which it was held that one having the actual possession of the property of another, might yet be guilty of robbery in respect to it, by using violence on the person of the owner, not to take possession, but to make off with the property. The case referred to is that of *James v. State*, 53 Ala. 380. The facts were, that the defendant and one Hardy were traveling together on foot, and Hardy handed certain articles contained in a bag to defendant, to be carried for him. They proceeded some distance in this way, when the defendant "took a step backwards, and struck witness behind on his neck, knocking him down and insensible;" and when Hardy recovered consciousness, the defendant was gone, and also the articles, which he had been carrying for Hardy. Manning, J. delivering the opinion, said: "Up to the time of the blow, there was no appropriation of these articles by the defendant, or denial of the property of witness in them. They were in the presence, and constructively in the possession of witness. The defendant may have well supposed he could not get away with them, they being heavy, without first knocking down and disabling their owner. And although they were in the hands of the defendant, carried by him at the request of the owner, they were

not taken from him, he being constructively in possession, and they being in his presence, as his property, until he was stricken by defendant and knocked down. The violence was not done after the goods were taken away, but they were taken away after and by means of the violence to the person of the owner." No authorities are cited to these propositions; and it is believed none can be found in the books. The chief fault of the opinion lies in the assumption, that the crime of robbery may be committed against such constructive possession as a man has through his agent. We do not so understand the law. The offence is against the actual possession, in the very nature of things. The person offended against must have either the manucaption of the property, or it must at least be in his presence, and under his direct physical, personal control; and the taking, which is an essential element of the crime, must amount to the transfer of this manucaption or personal control, by force or through fear, from the owner into the criminal. How is it possible for this to be done when this actual possession is already in the offender? How can he take from the owner that which he already had, and the owner has not? An English case will serve to illustrate the point. It is very like the James Case in respect to the application of the principle we are considering. "A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle, and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor: Held, that they could not be convicted of robbery, as the thing stolen was not in the personal-custody of the prosecutor;" Vaughan, B., observing, that "the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed." *Rex v. Fallows et al.*, 5 Car. & P. 508. This case manifestly proceeded on the ground, that the force was applied to A., while B. had the actual possession of the property, and that no force or putting in fear was resorted to to gain possession of the bundle after B. had thrown it down. We do not doubt that, after its relinquishment by B., if left in the presence of A., the latter had such possession as that to take it away by such force, or the putting in such fear, as to prevent or overcome his resistance, would have been robbery. But nothing of that sort character-

ized the case at bar, or the James Case; and the principle involved in *Rex v. Fallows* is the same as that which we are considering. The learned judge, who delivered the opinion in James' Case also, it seems to us, fell into the error of confounding asportation with taking. It is quite clear, on the facts of that case, that there was no taking in the sense necessary in robbery, but only a "taking away," that is a making off with property; and it is equally clear from the language we have quoted, that the violence was used, not to effect a "taking"—not to get physical control of the property—that James already had without resort to either violence or putting in fear—but to enable him to escape, and to carry with him property which he had not taken from the owner, but which had been voluntarily placed in his hands. We can not follow the James Case; but, receding from it, we hold, in consonance with the authorities cited, and with what we conceive to be eminently sound in principle, that violence or putting in fear, to constitute the essential factor in the crime of robbery, must precede, or be concomitant with, the taking of the property from the possession of the owner; and that no violence, no excitation of fear, resorted to merely for the purpose of keeping a possession already acquired, or of escaping after the possession has been acquired, will supply the element of force which is an essential ingredient of this offence.

Some of the rulings of the trial court, doubtless based on and induced by James' Case, *supra*, are erroneous under the view we have taken; and the judgment below will therefore be reversed, and the cause remanded.

Reversed and remanded.

State v. Broderick, 59 Mo. 318; *State v. McCune*, 5 R. I. 60; *State v. John*, 5 Jones (N. C.) 163; *Shinn v. State*, 64 Ind. 13; *State v. Miller*, 83 Ia. 291; *Gallagher v. State*, 30 S. W. 557; *State v. Trexler*, 2 Car. L. Rep. (N. C.) 90; *Bussey v. State*, 71 Ga. 100; *Clark*, p. 284; *Bishop II.*, Sec. 1174; *Wharton*, Sec. 850; *Hawley & McGregor*, p. 235.

NOTE.—Some statutes make it necessary that the force be exercised in taking or retaining, and not merely in making escape.

Shinn v. State, 64 Ind. 13; *Minn. Stat.* 1894, Sec. 6479; *N. Y. Penal Code*, Sec. 225; *Hawley & McGregor*, p. 236.

NOTE.—The degree of force is immaterial.

Minn. Stat. 1894, Sec. 6481.

(3) *Or the person must be put in fear.*

ASHWORTH v. STATE.

Court of Criminal Appeals of Texas, 1893.

31 Tex. Cr. Rep. 419; 20 S. W. 982.

DAVIDSON, J. Appellant, having been convicted of robbery, prosecutes this appeal. By the injured party the State proved that defendant and one of his confederates visited his store, heavily armed, and demanded various articles of his property. While there, defendant took from his pocket a paper, and, showing it, said to the witness, "A lot of my companions intended to make an assault on you, but some of my companions, who are not bad friends of yours, opposed it, saying that on account of your family they did not want to do it," and handed him the paper, which was signed, "J. F., of the Revolution," "and said that I had better give him the goods he wanted, or he and his companions would assault me. I told defendant I did not recognize the order, and did not and would not have dealings with that sort of people. Defendant again said he and his companions had consulted about getting the goods from me, and some wanted to assault me, and others did not, and that I had better let them have the goods. I then asked defendant how much goods would satisfy him and his companions, because I wanted to get off as light as possible, and I asked him if he would be satisfied with \$10 worth. Defendant wrote out a list of articles, asking me the price after he had put down on this memorandum a good many articles. I said, 'You have gotten down more than \$10 worth;' and he said, 'You can take off some of the sugar and coffee.' Defendant then said he would go and see whether his companions would be satisfied with the \$10 worth, and told me to fix up the parcels, and have them ready for him. Defendant and his companion then left." During the time defendant was at the store he was armed with a carbine and pistol, and held the carbine in his hand all the while. During their stay at the store his companion was marching to and fro in front of the door with his gun

"at a 'carry arms' position, like a sentinel." "In about eight minutes" after their departure the former companion of defendant, accompanied by another confederate, returned and carried away the goods demanded by defendant. Defendant did not return to the store. This witness further stated that he "gave up the goods because the defendant put me in fear of my life, and I was afraid they would assassinate me." A brother of the witness gave substantially the same testimony. Defendant testified also to the same facts, and, as to taking the goods, "said he was compelled to do so by Julian Florez and his band of followers." "They made me do it. They told me they would hang me if I did not do it. They caught me at Charamusea ranch, and said I was a spy, and kept me with them about a month. I could not get away from them. They watched me all the time, and had guards put around our camp at night." On cross-examination it was elicited from him that he and his two confederates rode to a point about a quarter of a mile distant from the store. One of them remained at this place, while defendant and the other went to the store. Upon their return to this companion, defendant remained alone, while the other two went to the store, secured the goods, rejoined defendant, and together the three returned to Florez and his band of followers, who were in waiting about three miles distant. He further stated that he was coerced by Florez and his band in this matter, and committed the robbery through fear of his life, and that his two companions accompanied him for the purpose of preventing his escape. It is contended that, under this state of case, the defendant was not guilty, inasmuch as he was coerced into committing the robbery. The question was submitted to the jury, under appropriate instructions, and decided adversely to defendant, and we think correctly so. Nor can we agree with contention of counsel that the evidence is insufficient to support the conviction. It is shown by defendant that he and his two attendant confederates left the camp of his nonattending confederates, the revolutionist Florez and his band of 30, for the specific purpose of committing the identical robbery afterwards perpetrated by them. They proceeded to the place specified; procured from the designated party, by putting him in fear of his life, the property desired; and conveyed it to the camp of their leader. That defendant was at a short distance from the store at the very

moment the property was taken, and not actually present at the scene of the robbery, does not relieve him of the consequences of the crime; nor was it essential to his conviction that the goods should have been delivered at the time of his demand. It is sufficient if the cause produced by defendant inducing the delivery of the goods was operative upon the mind of the injured party at the time of such delivery, it being shown that defendant had not abandoned the enterprise, and was still acting with his co-conspirators. This would constitute robbery as much in defendant as in those who were actually engaged in the taking; and this would be equally true if the goods were delivered because of the prosecutor's fear of life, produced by the previous acts of defendant, where those receiving the goods were believed to be confederates of defendant. "If thieves come to rob A., and, finding little upon him, force him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him." 1 Whart. Crim. Law, sec. 856; 1 Hale, P. C. 532. It was clearly shown that defendant was a principal in the transaction; that the goods were delivered because of the fear operating upon the mind of the owner at the time of the delivery, and superinduced by the acts, conduct, and threats of defendant, and were received by those acting with him, in accordance with the original design. The charge is criticised in various respects, but we do not concur in these criticisms. We think the charge fairly presents the law of the case. The judgment is affirmed. Judges all present and concurring.

Sweat v. State, 17 S. E. 273; *Long v. State*, 12 Ga. 293; *State v. Hower-ton*, 58 Mo. 581; *Clark*, p. 284; *Bishop II.*, Sec. 1174; *Wharton*, Sec. 850; *Hawley & McGregor*, p. 236.

NOTE.—In some jurisdictions it is made robbery in the first degree when the act is committed by the use of a *dangerous weapon*, or through the assistance of an *accomplice* actually present, or by inflicting grievous bodily harm on the person or persons in his presence.

Minn. Stat. 1894, Sec. 6482; N. Y. Penal Code, Sec. 228.

NOTE.—When the act is committed without the surrounding conditions of the preceding note, by the use of violence or by putting the person robbed in fear of immediate injury to his person, it is robbery in the second degree.

Minn. Stat. 1894, Sec. 6483; N. Y. Penal Code, Sec. 229.

e.

Libel.

Criminal libel is defined by statutes as "A malicious publication, by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause, any person to be shunned, or avoided, or which has a tendency to injure any person, corporation, or association of persons in his or their business or occupation, is a libel."

N. Y. Penal Code, Sec. 242; Minn. Stat. 1894, Sec. 6496; Clark, p. 346; Wharton, Sec. 1594 *et seq.*; Bishop II., Sec. 907; The Penal Code of Pa.; Shields, vol. I., 210-214; vol. II., 615.

By the criminal law there must be a publication to constitute the offence, but this has been modified by statutes, so that if one knowingly parts with the defamatory matter, under circumstances which expose it to be seen, the crime is committed.

Minn. Stat. 1894, Sec. 6496; *State v. Avery*, 7 Conn. 266; Clark, pp. 347, 364; Wharton, Sec. 1618.

NOTE.—Malice is necessary to render one criminally liable for libel; but, no justification appearing, malice is presumed from the publication of libelous matter.

Minn. Stat. 1894, Sec. 6498; *Com. v. Blanding*, 3 Pick. (Mass.) 304; *Pledger v. State*, 77 Ga. 242; Clark, p. 349; Bishop II., Secs. 922, 923; Wharton, Sec. 1648.

NOTE.—Truth was not a defence at common law to criminal libel, but it is made so by statute in some jurisdictions.

Const. Minn., Art. I., Sec. 3; Clark, p. 347; Bishop I., Secs. 308, 319; *Com. v. Clap*, 4 Mass. 163; *Com. v. Blanding*, 3 Pick. 304; Minn. Stat. 1894, Sec. 6498; Wharton, Sec. 1643.

4. CRIMES AGAINST THE PERSON, PUBLIC DECENCY AND
GOOD MORALS.

a.

Rape.

Rape is a man's ravishment of a woman *with force* when she *does not consent*.

STATE v. BURGDORF.

Supreme Court of Missouri, 1873.

53 Mo. 65.

SHERWOOD, J., delivered the opinion of the court.

Burgdorf was indicted for the crime of rape alleged to have been perpetrated by him on Anna Rorschach, a girl about sixteen years of age.

The trial of the cause resulted in a verdict of guilty, and judgment accordingly, and after moving unsuccessfully for a new trial, this case comes here by appeal.

The only ground relied on for a reversal, is that the verdict is entirely unsupported by the evidence.

Without setting forth in detail the disgusting particulars of this accusation, it is sufficient to say with regard to the salient points in the evidence, that whether we consider the place of the reputed offence (a house but a few feet distant from one in which two families were then living), the early hour in the evening at which it is said to have occurred, or the manner of its alleged perpetration (viz: the seizure by the defendant of both of the girl's hands, in one of his, the holding of them behind her back, and while thus still holding them seating himself in a chair, raising one of her legs with one hand, and the other leg with his foot, pulling her "astraddle" of his lap and consummating the outrage, and this too, while holding to the table on which

was a lighted lamp, with his other hand, and thus preventing her from pushing him over, as she says, the second time), the story of the girl is to the last degree improbable.

In addition to this, she is contradicted by Hammill, a witness on the part of the State who was peeping through a crack of the door, only some seven or eight feet distant, and who reiterates the statement that though he heard a kind of screaming at first, the girl made no outcry while the offence was being perpetrated; and that after defendant laid down his pipe and took her by the arm, and placed her in the position above referred to, she seemed to be "satisfied," and that she also caught hold of the table with the lighted lamp on it; and the lamp stood still.

And Ehert, though not so positive in his statements as to outcries, as Hammill, says he heard no screaming while he and the former were together at the door.

Further than that, the physician who examined the girl the next day, stated that he found no bruises on her person, and that he got her to make statements respecting the alleged offence.

In trials of this character, the admonitory advice of Lord Hale, that this is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent, should never be forgotten.

Here, the testimony of the party said to be injured, is not only unsupported by any other evidence, but in its more prominent and essential features, is flatly contradicted. And she never makes any complaint only as it is extorted from her by the interrogatories of the medical examiner.

Besides the method of the sexual act in question, can scarcely be credited, unless consent were one of the ingredients of the transaction. Thus, where the prisoner worked himself under the prosecutrix, and in this way had connection with her, it was held no rape, and this evidently upon the ground of extreme improbability.

The crime under consideration, can, in the language of one of the authorities, only be committed where there is on the part of her on whom the attempt is made, "the utmost reluctance, and the utmost resistance."

The "passive policy" or a mere half-way case, will not do.

It certainly must have been a very amicable struggle indeed,

which would inflict no bruises on the girl; cause no outcries during its continuance, and leave the lighted lamp standing still upon the table; which in the effort for supremacy, was grasped by both contestants.

In a word, this was not the conduct of a woman jealous of her chastity, shuddering at the bare thought of dishonor, and flying from pollution. Had it not been for the tell-tale crack in the door, we doubtless would have never heard from this case.

The jury committed the very common error, of allowing the heinousness of the charge to hurry them on to the conclusion reached in their verdict. But accusation and guilt are not yet synonymous—some attention has still to be paid to the rules of evidence; and the court should not have permitted the verdict,

“Baseless as the fabric of a vision.”

Judgment reversed and cause remanded. The other judges concur.

Oleson v. State, 11 Neb. 276; *Reynolds v. State*, 27 Neb. 90; *People v. Dohring*, 59 N. Y. 374; *State v. Shields*, 45 Conn. 263; *Brown v. Com.*, 82 Va. 653; *Reg. v. Hallet*, 9 Car. & P. 748; *Whittaker v. State*, 50 Wis. 518; *Connors v. State*, 47 Wis. 523; *Bradley v. State*, 32 Ark. 704; *Matthews v. State*, 19 Neb. 330; *State v. Knapp*, 45 N. H. 148; *Com. v. Burke* 105 Mass. 376; *Blackburn v. State*, 22 Ohio St. 102; *State v. Hargrave*, 65 N. C. 466; *State v. Connelly*, 57 Minn. 482; *Wyatt v. State*, 2 Swan 394; *Minn. Stat.* 1894, Sec. 6523; *Clark*, p. 184; *Bishop II.*, Sec. 1108; *Whar-ton*, Sec. 550; *Hawley & McGregor*, p. 169; *The Penal Code of Pa.*; *Shields*, vol. I., 191, 225, 438, 448, 449, 450.

NOTE.—At common law a minor under the age of fourteen is conclusively presumed incapable of committing rape.

Reg. v. Phillips, 8 Car. & P. 736; *State v. Handy*, 4 Harr. 566; *Reg. v. Jordan*, 9 Car. & P. 118; *Clark*, pp. 51, 191; *Bishop I.*, Sec. 373; *Whar-ton*, Sec. 69; *Hawley & McGregor*, p. 170.

NOTE.—In some States this presumption is disputable.

Williams v. State, 14 Ohio 222; *People v. Randolph*, 2 Park Cr. Rep. 174; *Gordon v. State*, 21 S. E. 54; *Com. v. Green*, 2 Pick. 380; *State v. Pugh*, 7 Jones (N. C.) 61; *N. Y. Penal Code*, Sec. 279; *O'Meara v. State*, 17 Ohio St. 515; *Moor. v. State*, 17 Ohio St. 521; *State v. Jones*, 39 La. Ann. 935; *Heilman v. Com.*, 84 Ky. 457; *Clark*, p. 191; *Bishop I.*, Sec. 373; *Bishop II.*, Sec. 1117; *Hawley & McGregor*, p. 170.

(1) *Consent as a Defence.*

The consent of the woman to be a good defence must be rationally, intelligently and voluntarily given, hence if a man knowingly has connection with a woman incapable of consenting, or overcomes her free will by intimidation, the act is rape.

COMMONWEALTH *v.* BURKE.

Supreme Judicial Court of Massachusetts, 1870.

105 Mass. 376.

GRAY, J. The defendant has been indicted and convicted for aiding and assisting Dennis Green in committing a rape upon Joanna Caton. The single exception taken at the trial was to the refusal of the presiding judge to rule that the evidence introduced was not sufficient to warrant a verdict of guilty. The instructions given were not objected to, and are not reported in the bill of exceptions. The only question before us therefore is, whether, under any instructions applicable to the case, the evidence would support a conviction.

That evidence, which it is unnecessary to state in detail, was sufficient to authorize the jury to find that Green, with the aid and assistance of this defendant, had carnal intercourse with Mrs. Caton, without her previous assent, and while she was, as Green and the defendant both knew, so drunk as to be utterly senseless and incapable of consenting, and with such force as was necessary to effect the purpose.

All the statutes of England and of Massachusetts, and all the text books of authority, which have undertaken to define the crime of rape, have defined it as the having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier and more weighty authorities show that the words "against her will," in the standard definitions,

mean exactly the same thing as "without her consent;" and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded.

The most ancient statute upon the subject is that of Westm. I. c. 13, making rape (which had been a felony at common law) a misdemeanor, and declaring that no man should "ravish a maiden within age, neither by her own consent, nor without her consent, nor a wife or maiden of full age, nor other woman, against her will," on penalty of fine and imprisonment, either at the suit of a party or of the king. The St. of Westm. II. c. 34, ten years later, made rape felony again, and provided that if a man should "ravish a woman, married, maiden, or other woman, where she did not consent, neither before nor after," he should be punished with death, at the appeal of the party; "and likewise, where a man ravisheth a woman, married lady, maiden, or other woman, with force, although she consent afterwards," he should have a similar sentence upon prosecution in behalf of the king.

It is manifest upon the face of the Statutes of Westminster, and is recognized in the oldest commentaries and cases, that the words "without her consent" and "against her will" were used synonymously; and that the second of those statutes was intended to change the punishment only, and not the definition of the crime, upon any indictment for rape—leaving the words "against her will," as used in the first statute, an accurate part of the description. Mirror, c. 1, sec. 12; c. 3, sec. 21; c. 5, sec. 5. 30 & 31 Edw. I. 529-532. 22 Edw. IV. 22. Staunf. P. C. 24 a. Coke treats the two phrases as equivalent; for he says: "Rape is felony by the common law declared by parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will or against her will;" although in the latter case the words of the St. of Westm. I. (as we have already seen) were "neither by her own consent, nor without her consent." 3 Inst. 60. Coke elsewhere repeatedly defines rape as "the carnal knowledge of a woman by force and against her will." Co. Lit. 123 b. 2 Inst. 180. A similar definition is given by Hale, Hawkins, Comyn, Blackstone, East and Starkie, who wrote while the Statutes of Westminster were in force; as well as by the text writers of most reputation since the St. of 9 Geo. IV. c.

31, repealed the earlier statutes, and, assuming the definition of the crime to be well established, provided simply that "every person convicted of the crime of rape shall suffer death as a felon." 1 Hale P. C. 628. 1 Hawk. c. 41. Com. Dig. Justices, S. 2. 4 Bl. Com. 210. 1 East P. C. 434. Stark. Crim. Pl. (2d ed.) 77, 431. 1 Russell on Crimes (2d Am. ed.), 556; (7th Am. ed.) 675. 3 Chit. Crim. Law, 810. Archb. Crim. Pl. (10th ed.) 481. 1 Gabbett Crim. Law, 831. There is authority for holding that it is not even necessary that an indictment, which alleges that the defendant "feloniously did ravish and carnally know" a woman, should add the words "against her will." 1 Hale P. C. 632. *Harman v. Commonwealth*, 12 S. & R. 69. *Commonwealth v. Fogerty*, 8 Gray, 489. However that may be, the office of those words, if inserted, is simply to negative the woman's previous consent. Stark. Crim. Pl. 431 note.

In the leading modern English case of *The Queen v. Camplin*, the great majority of the English judges held that a man who gave intoxicating liquor to a girl of thirteen, for the purpose, as the jury found, "of exciting her, not with the intention of rendering her insensible, and then having sexual connection with her," and made her quite drunk, and, while she was in a state of insensibility, took advantage of it, and ravished her, was guilty of rape. It appears indeed by the judgment delivered by Patterson, J. in passing sentence, as reported in 1 Cox Crim. Cas. 220, and 1 C. & K. 746, as well by the contemporaneous notes of Parke, B., printed in a note to 1 Denison, 92, and of Alderson, B., as read by him in *The Queen v. Page*, 2 Cox Crim. Cas. 133, that the decision was influenced by its having been proved at the trial that, before the girl became insensible, the man had attempted to procure her consent, and had failed. But it further appears by those notes that Lord Denman, C. J., Parke, B., and Patteson, J., thought that the violation of any woman without her consent, while she was in a state of insensibility and had no power over her will, by a man knowing at the time that she was in that state, was a rape, whether such state was caused by him or not; for example, as Alderson, B., adds, "in the case of a woman insensibly drunk in the streets, not made so by the prisoner." And in the course of the argument this able judge himself said that it might be considered against the general pre-

sumable will of a woman that a man should have unlawful connection with her. The later decisions have established the rule in England that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether that state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape. *The Queen v. Ryan*, 2 Cox Crim. Cas. 115. Anon. by Willes, J., 8 Cox Crim. Cas. 134. *Regina v. Fletcher*, Ib. 131; S. C. Bell, 63. *Regina v. Jones*, 4 Law Times (N. S.) 154. *The Queen v. Fletcher*, Law Rep. 1 C. C. 39; S. C. 10 Cox Crim. Cas. 248. *The Queen v. Barrow*, Law Rep. 1 C. C. 156; S. C. 11 Cox Crim. Cas. 191. Although in *Regina v. Fletcher*, *ubi supra*, Lord Campbell, C. J. (ignoring the old authorities and the repealing St. of 9 Geo. IV.), unnecessarily and erroneously assumed that the St. of Westm. II. was still in force; that it defined the crime of rape; and that there was a difference between the expressions "against her will" and "without her consent," in the definitions of this crime; none of the other cases in England have been put upon that ground, and their judicial value is not impaired by his inaccuracies.

The earliest statute of Massachusetts upon the subject was passed in 1642, and, like the English Statutes of Westminster, used "without consent" as synonymous with "against her will," as is apparent upon reading its provisions, which were as follows: 1st. "If any man shall unlawfully have carnal copulation with any woman child under ten years old, he shall be put to death, whether it were with or without the girl's consent." 2d. "If any man shall forcibly and without consent ravish any maid or woman that is lawfully married or contracted, he shall be put to death." 3d. "If any man shall ravish any maid or single woman, committing carnal copulation with her by force, against her will, that is above the age of ten years, he shall be either punished with death, or with some other grievous punishment, according to circumstances, at the discretion of the judges." 2 Mass. Col. Rec. 21. Without dwelling upon the language of the first of these provisions, which related to the abuse of female children, it is manifest that in the second and third, both of which related to the crime of rape, strictly so called, and differed only in the degree of punishment, depending upon the question whether the woman was or was not married or engaged to be

married, the legislature used the words "without consent," in the second provision, as precisely equivalent to "against her will," in the third. The later revisions of the statute have abolished the difference in punishment, and therefore omitted the second provision, and thus made the definition of rape in all cases the ravishing and carnally knowing a woman "by force and against her will." Mass. Col. Laws (ed. 1660), 9; (ed. 1672) 15. Mass. Prov. Laws, 1692-3 (4 W. & M.) c. 19, sec. 11; 1697 (9 W. III.) c. 18; (State ed.) 56, 296. St. 1805, c. 97, sec. 1. Rev. Sts. c. 125, sec. 18. Gen. Sts. c. 160, sec. 26. But they cannot, upon any proper rule of construction of a series of statutes *in pari materiâ*, be taken to have changed the description of the offence. *Commonwealth v. Sugland*, 4 Gray, 7. *Commonwealth v. Bailey*, 13 Allen, 541, 545.

We are therefore unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach.

1. Exceptions overruled.

State v. Artherton, 50 Ia. 189; *People v. Croswell*, 13 Mich. 427; *Don Moran v. People*, 25 Mich. 355; *State v. Ward*, 73 Ia. 532; *Regina v. Camplin*, 1 Den. C. C. 89; *Regina v. Barratt*, 12 Cox C. C. 498; *Regina v. Mayers*, 12 Cox C. C. 311; *Rice v. State*, 17 So. 286; *Carugh v. State*, 25 S. W. 778; *State v. Enright*, 58 N. W. 901; *Thompson v. State*, 26 S. W. 987; *Clark*, p. 185 *et seq.*; *Bishop II.*, Sec. 1122; *Wharton*, Sec. 556 *et seq.*; *Hawley & McGregor*, p. 172.

NOTE.—In some jurisdictions fraud will not supply the place of force; and consent, though obtained by fraud, is a good defence.

Clark v. State, 30 Tex. 448; *Don Moran v. People*, 25 Mich. 355; *State v. Burgdorf*, 53 Mo. 65; *Whittaker v. State*, 50 Wis. 518; *People v. Royal*, 53 Cal. 62; *State v. Murphy*, 6 Ala. 765; *People v. Crosswell*, 13 Mich. 427.

Contra.—*Regina v. Dee*, 15 Cox C. C. 579; *Mooney v. State*, 29 Tex. App. 257; *Pomeroy v. State*, 94 Ind. 96; *Reg. v. Flattery*, 13 Cox C. C. 388; *Osgood v. State*, 64 Wis. 472; *State v. Shields*, 45 Conn. 256; *State v. Farr*, 28 Ia. 397; *Clark*, p. 188; *Bishop II.*, Sec. 1122; *Wharton*, Secs. 559-563; *Hawley & McGregor*, p. 172.

NOTE.—At common law a girl under twelve could not consent. The age of consent is fixed by statute in each jurisdiction. Consent below the age is not a defence.

Com. v. Roosnell, 143 Mass. 32; *People v. Goulette*, 82 Mich. 36; *People v. Flaherty*, 79 Hun. 48; *People v. Verdegreen*, 39 Pac. 607; *Head v. State*, 61 N. W. 494; *Farrell v. State*, 24 Atl. Rep. 223; *White v. Com.*, 28 S. W. 340; *Clark*, p. 187; *Bishop II.*, Sec. 1118; *Hawley & McGregor*, p. 172; *Minn. Stat.* 1894, Sec. 6524.

NOTE.—Penetration of the male organ must be proved, but it may be inferred from circumstances.

State v. Smith, 9 Houst. 488; 33 Atl. Rep. 441; *Hardtke v. State*, 67 Wis. 552; *State v. Dalton*, 106 Mo. 463; *State v. Hargrave*, 65 N. C. 466; *Osgood v. State*, 64 Wis. 472; *Minn. Stat.* 1894, Sec. 6527; *Clark*, p. 189; *Bishop II.*, Sec. 1132; *Wharton*, Sec. 554; *Hawley & McGregor*, p. 170.

b.

Seduction.

Seduction is the act of enticing an unmarried female of previous chaste character to have illicit intercourse. The object is here accomplished by persuasion and promises of marriage and not by force.

PEOPLE v. VAN ALSTYNE.

Court of Appeals of New York, 1895.

144 N. Y. 361; 39 N. E. 343.

PECKHAM, J. The defendant has been convicted of the crime of seduction under a promise of marriage. It is urged in his behalf that the evidence on the trial as given by the prosecutrix herself simply shows the making of a conditional promise by defendant to marry the prosecutrix only in case she became pregnant as a result of that intercourse. It is then insisted that if

the promise were of that nature it was insufficient upon which to base a conviction under the statute. We think the defendant's counsel is right in the construction to be given the evidence in the case. On carefully reading the testimony of the prosecutrix we feel confident that the only promise which she proves on the part of defendant was the conditional one to marry her in case she became pregnant. She does state in one portion of her evidence an unconditional promise, but she immediately follows it by the statement of the conditional one, and we think it obvious from her whole evidence that the conditional is really the only promise which she regards as made or which can reasonably be inferred. The evidence which she gave before the justice in the other proceeding, and which in substance she admitted, and which was proved upon this trial, shows that she regarded the promise as one made only in case she became pregnant. Assuming the promise was of such a nature we are of the opinion that it was not of that kind contemplated by the statute. It was never intended to protect a woman who was willing to speculate upon the results of her intercourse with a man and who only exacted as the price of her consent a promise on his part to marry her in case the intercourse resulted in her pregnancy. The conditional promise mentioned in *Kenyon v. People* (26 N. Y. 203) is very different from the one here under discussion. It was an absolute promise to marry the prosecutrix if she would consent to have intercourse with him, and when she consented and the intercourse took place, the promise became mutual and the condition was performed. A promise on her part was implied from the fact that she yielded to the solicitations of the defendant, and, in consideration of his promise, the intercourse took place. The condition was performed the very moment that such intercourse was accomplished. It came within the very words of the statute and also within its purpose. The seduction was accomplished under and upon the faith of an unconditional promise to marry her. It was the consideration for and the inducement to such intercourse. In *Boyce v. People* (55 N. Y. 644) the same kind of a conditional promise was proved and held to be sufficient, the court refusing to hold that there was anything in the evidence to justify the claim that the promise was to marry only in case the accused should be satisfied that the prosecutrix

was a virgin. In *Armstrong v. People* (70 N. Y. 38, at 53) the court says that the question is not raised by the evidence, and refuses to discuss it for that reason. The statute was passed to protect a confiding and chaste woman in yielding to the solicitations of the man who had promised to marry her. It was not the purpose of the law to throw its protection around the woman who was willing to consent to the act, and who only asked for a promise of marriage in case her lapse from chastity should be discovered by reason of her pregnancy. In such case she consents at a time when there is no real promise.

We think the case of *People v. Duryea* (30 N. Y. Supplement, 877) was well decided upon this very ground, and we approve the reasoning of Brown, P. J., therein contained.

The court below should have granted the motion of defendant, and should have discharged or directed the jury to acquit him on the ground that no sufficient promise of marriage was proved to constitute a criminal offence under section 284 of the Penal Code.

The judgment should be reversed, and, as there can be no conviction of defendant under the evidence as given by the prosecutrix, he should be discharged.

All concur, except Haight, J., not sitting.

Judgment reversed.

State v. Crawford, 34 Ia. 40; *State v. Timmens*, 4 Minn. 325; *State v. Higdon*, 32 Ia. 262; *Wood v. State*, 48 Ga. 192; *People v. Krusick*, 93 Cal. 74; *State v. Pimm*, 98 Mo. 368; *State v. McIntire*, 56 N. W. Rep. 419; *O'Neill v. State*, 85 Ga. 383; *State v. Cochran*, 10 Wash. 562; *Norton v. State*, 16 So. 264; *State v. Thornton*, 108 Mo. 640; Clark, p. 184; Minn. Stat. 1894, Sec. 6531; Wharton, Sec. 1756 *et seq.*; Hawley & McGregor, p. 282.

NOTE.—In most jurisdictions subsequent intermarriage or lapse of the statutory period of time is a bar to prosecution.

Minn. Stat. 1894, Sec. 6532; N. Y. Penal Code, Sec. 285; Clark, p. 198; Wharton, Sec. 1760.

c.

Abortion.

"Abortion is to cause or procure the miscarriage or premature delivery of a woman."

STATE *v.* MORROW.

Supreme Court of South Carolina, 1893.

40 S. C. 221; 18 S. E. 853.

McIVER, C. J. The defendant in this case was indicted under the act of 1883 (18 St. 547), entitled "An act to amend the criminal law by providing for the punishment of abortion." The only portions of that act pertinent to the present appeal are sections 1 and 2. Section 1 reads as follows: "That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, or abortion, or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results, in whole or in part, therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not more than twenty years, nor less than five years." Section 2 is in the following language: "That any person who shall administer to any woman with child, or prescribe, or procure, or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance, or thing whatever, or shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, or abortion, or premature labor, of any such woman, shall, upon conviction thereof, be punished

by imprisonment in the penitentiary for a term not more than five years," etc.

The indictment contained two counts, the first charging that the defendant "unlawfully did suggest, advise, induce, and procure one Colie Fowler, a single woman, then and there being pregnant with child, to take divers quantities of a certain pernicious and destructive substance, drug, or medicine, in the form and shape of pills, with intent to cause or procure the abortion," etc., and proceeds to allege that, by the use of said means, the abortion was procured, and that the death of the said Colie Fowler was thereby caused. In the second count the charge is that the defendant "unlawfully did prescribe, procure, and advise one Colie Fowler, a single woman, then and there being pregnant with child, to take divers quantities of a certain pernicious and destructive substance, drug, or medicine, in the form and shape of pills, with intent to cause or procure the abortion," etc.

The case came on for trial before his honor, Judge Wallace, and a jury, when there was much testimony taken, and, in the opening argument of the counsel for the defence, a plea to the jurisdiction of the court was interposed, upon grounds which will hereinafter appear; and, after argument thereon, the plea to the jurisdiction was overruled, and the case was submitted to the jury under the charge of the judge, which should be incorporated in the report of this case, together with his reasons for overruling the plea. The jury having rendered a verdict of guilty, and sentence having been passed upon the defendant, he appeals, upon the several exceptions set out in the record, which need not be repeated here, but which should likewise appear in the report of the case.

We propose to take up these exceptions in their inverse order. The twelfth exception imputes error in admitting as evidence, in reply, certain letters purporting to have been written by the defendant. This is manifestly based upon a misconception, for nothing of the kind appears either in the printed case or in the typewritten copy of the testimony filed in this court. Indeed, as no allusion was made to this exception in the argument of counsel for appellant, we suppose it was abandoned; but, whether abandoned or not, it certainly cannot be sustained, for the reason indicated.

The eleventh exception complains of error on the part of the circuit judge in overruling defendant's exception to the indictment, upon the ground that the acts charged in the first count are not charged to have been done "feloniously." Here, also, we are unable to find anything in the case upon which this exception can be based. It does not appear that the circuit judge was ever called upon to make, or did make, any ruling upon the subject. Besides, no such exception could be heard unless taken before the jury were sworn (Act 1887; 19 St. 829); and there is nothing to show that the exception was taken at the proper time. Indeed, we presume from the fact that no allusion is made in the argument submitted here to this exception that it is likewise abandoned, but, whether this is so or not, the exception must be overruled.

The tenth exception is somewhat misleading, and for that reason this exception is reproduced precisely as we find it in the record, with the italics there found: "For that his honor charged the jury that if they believed beyond a reasonable doubt that the defendant procured, or attempted or intended to procure, an abortion by *any of the means set out and prescribed in the act on that subject*, they must find a verdict of guilty on the first or second count, or generally, as the case might be; whereas he should have instructed the jury that the prosecution was limited in its evidence, and the jury, in arriving at their verdict, to the means (and the proof thereof) set forth in the indictment." The point of this exception, as we understand it, is that inasmuch as the statute under which this defendant was indicted contemplates two distinct and different means by which abortion may be caused,—viz: (1) by the use of drugs, and (2) by the use of instruments, involving the application of force,—and inasmuch as the indictment charges only the first, no evidence could properly be received tending to show the use of the second, and, if received, the jury should have been instructed that they could not find the defendant guilty if they believed that the abortion was caused, or attempted to be caused, by the use of instruments, involving some degree of force, and not by the use of drugs, as alleged in the indictment. To make this point available to the defendant, there should have been some request so to instruct the jury, and a refusal to grant such request. But no such request

and no such refusal are to be found in the case. The copy of the testimony with which we have been furnished, in addition to the printed case, shows that there was no testimony offered by the prosecution tending to show that the abortion was either caused or attempted by the use of any other means than those set forth in the indictment; and it is a well-settled rule that the correctness of a judge's charge must be tested by its application to the case, as made by the pleadings and the evidence. The matter of the use of instruments, involving some degree of force, was introduced into the case by the defendant in his cross-examination of the witnesses for the prosecution, and in the examination of the witnesses for the defence, for the purpose, doubtless, of showing that the abortion was caused, or at least was more likely to have been caused, by the use of instruments, rather than by the use of the means set out in the indictment. It was a pure matter of defence, not embraced in the issue presented by the pleadings; and, if the defendant desired that the jury should be instructed as to the effect of such defence if made out by the evidence, his proper course was to present a request to that effect. But, in addition to this, the exception does not correctly represent the judge's charge. He did not say to the jury what he is represented to have said in that portion of the exception which is italicized. He did not use the word "any," which is the important word in the exception, necessary to raise the point upon which this exception is based. On the contrary, the judge, after setting out the first section of the act, under which the first count in the indictment was framed, and stating what was the charge in that count, proceeded to say: "That is your first inquiry,—whether or not this defendant did that. If he did, he is guilty, under this act; if he did not, he is not guilty, under this first section of the act." If he did what? Why, certainly if he did what was charged in the first count of the indictment, viz: cause the abortion by the use of drugs. But the judge did not stop there, for he immediately proceeded to say: "If he did not, he is not guilty." Could language make it plainer to the jury that, unless the defendant did what was charged in the first count, he could not be found guilty, no matter what else he may have done. So that this analysis shows that the jury were practically instructed, so far at least as the first count was concerned,

precisely in accordance with such a request as would have been the proper mode of raising the point; and as the jury found a general verdict of guilty, which, of course, embraced the first count, if there was no error (as there evidently was none) in the instruction as to the first count, it would make no practical difference to the defendant even if there was error in the instruction as to the second count, which, however, we are not prepared to admit.

On examination of that portion of the charge which relates to the second count in the indictment, we find that the circuit judge, after setting out the second section of the act, and pointing out the difference between that and the first section, and declaring, in general terms, what would constitute a violation of section 2, proceeds to say that in order to convict the defendant, under that section, "you will have to be satisfied beyond a reasonable doubt that he attempted to procure an abortion,—intended to do it,—by the means stated here in the section I have read to you." This language, isolated from the context, would seem to afford some support for the position contended for by the appellant; but when it is taken in connection with the entire charge, as it must be, under the well-settled rule, it is apparent that it does not justify the position of the appellant, for in the very next paragraph we find that the jury, after being told what were the issues which they were to try, were instructed as follows: "If you are satisfied beyond a reasonable doubt that either or both of these offences are made out, you will have to convict him according to the degree of offence described in the act *and set forth in the indictment.*" (Italics ours.) Again, the jury were told: "If you are of opinion, and are satisfied of it, beyond a reasonable doubt, that he attempted to procure an abortion,—intended to do it,—by the means set out here in this act, but that such means did not accomplish his purpose, but that the abortion was procured by other means, to which he was not a party, then you cannot convict him on the first count, but may on the second, if you are satisfied beyond a reasonable doubt." This, followed by the approval and adoption of the solicitor's first request to charge, as set out in the charge, shows that the judge did not intend to charge, and could not have been understood as charging, that the defendant could be convicted without the means

of procuring the abortion, or attempting to procure it, being such as were set out in the indictment. Moreover, there was not the slightest evidence tending to show that the defendant either used or employed, or advised the use or employment, of any instrument, involving force, to cause the abortion; and, as the well-settled rule is that the charge of a circuit judge must be understood as applying to the case as made by the evidence, we cannot consider the charge here as open to the objection made by the tenth exception.

Again, even if the jury had believed that the abortion was in fact caused by the use of instruments, involving the application of some force, rather than by the drugs taken as alleged in the indictment, and had at the same time believed that the defendant had advised the use of such drugs with intent to bring about abortion, the jury should still have rendered a verdict of guilty under the second count of the indictment; for it is quite clear that the second section of the act does not require that, in order to constitute the offence there denounced, the means resorted to should prove effective to accomplish the purpose intended. The offence consists in the use of the means mentioned in the act, with the intent to cause abortion, and it is immaterial whether such means effected the purpose intended or not. We are of opinion, therefore, that the tenth exception cannot be sustained.

All of the remaining exceptions, in different forms, impute error to the circuit judge in overruling the plea to the jurisdiction; but as the second and seventh exceptions seem to imply that it was necessary, in order to constitute the offence charged, that some force or duress of some kind should have been used to induce Colie Fowler to use the means resorted to for the purpose of causing the abortion, we will first consider the point thus made. To dispose of this point, it is quite sufficient to say that the act under which the defendant was indicted plainly does not contemplate any ingredient of that kind in the offence there made punishable in the manner therein prescribed. There is not a word in either section of the act which signifies that the legislature intended that the use of force or duress in any form was an element in the offence. On the contrary, the act plainly shows that no such element was contemplated as constituting any part of the offence. It is obvious from a mere reading of the act, and

no argument can make it plainer. Indeed, this point was not mentioned in the argument.

The remaining exceptions may be considered together. The question which these exceptions present is thus stated in the argument of counsel for appellant: "Whether the court of general sessions for Richland county, S. C., had jurisdiction to try the defendant for his alleged violation of the statutes of this State; he having been, at the time of the commission of the only overt acts charged upon him, a citizen of, and actually in, another State." We do not think that this is a precisely accurate statement of the question as it is presented by the record in this case, for there was evidence tending to show that the defendant had had sexual intercourse with this unfortunate girl, likely to result in pregnancy; that when she discovered her condition, and communicated the same to defendant, he then formed the intention of using means to cause an abortion; that the intention thus conceived was attempted to be carried out by applying to a physician to know whether the drug which he had procured to effect his purpose would be sufficient to effect his object; and that such drug was taken by the girl at his instance and by his advice. True, he attempted to disguise what the jury under the evidence, might well have regarded as his real purpose, by saying to the physician that he had a little lady friend who had missed her regular monthly period, and desired to know what would be the best thing to bring it on; but his remark to the doctor that the girl was awfully scared about it, and would not have her condition known for anything in the world, coming, as it did, from a man who was in no wise related to the girl, and only temporarily resident in Columbia, would have well warranted the jury in concluding that the real object of the defendant was to obtain something that would cause abortion, and that he did procure a certain drug, which the girl used, by his advice, for the purpose of causing the abortion. All this occurred in the city of Columbia, in this State; and therefore it is not correct to say, as is said in the statement of the question above quoted from the argument for the appellant, that he was, at the time of the commission "of the only overt acts charged upon him, a citizen of, and actually in, another State." Under this view of the case, there would be no ground for the plea to the jurisdiction, and this would be conclu-

sive of this appeal so far as the question of jurisdiction is concerned.

In deference, however, to the zeal and ability with which this appeal has been prosecuted, we will not decline to consider the question as it is formulated in the argument of counsel. For this purpose only, we will, for the present, disregard the testimony above alluded to as to what occurred in Columbia, and consider the case as if the only "overt acts," as they are somewhat incorrectly termed, were committed in the city of Washington, District of Columbia, though we must say it is somewhat difficult to separate the intention (which there was evidence tending to show was originally formed in Columbia) from the acts done in Washington in pursuance of such intention. Assuming, however, for the purposes of this discussion only, that there was no evidence of any act done, in pursuance of an intention to effect an abortion, except such acts as were done by the defendant in the city of Washington, then, if the acts there done were intended to take effect in this State, and did there actually take effect, we still think the court, in this State, had jurisdiction of the offence charged. The evidence leaves no doubt that, after the defendant left this State, and returned to Washington, he procured from a druggist there certain drugs in the shape of pills, which he sent, through the agency of the United States mail, to Colie Fowler, with the advice to use them for the purpose of bringing about an abortion; that she received the pills so sent, and used them according to the advice given her by the defendant; and that the abortion did take place, which resulted in the death of said Colie Fowler. Under this state of facts, the question is whether the courts of this State could take jurisdiction. There can be no doubt that it is the duty of a State to protect, as far as practicable, the lives and persons of its citizens and others temporarily resident therein against unlawful violence or injury, whether the person committing such violence or inflicting such injury be a citizen of this State at the time, or not. If such person go beyond the jurisdiction after committing the act, or be and remain beyond the limits of the State when the unlawful act is committed, it may be difficult, and oftentimes impossible, to obtain jurisdiction of the person of the party committing the act, which would be necessary to give jurisdiction. But juris-

diction of the person and jurisdiction of the subject-matter are two entirely distinct and different things; and where, as in this case, the party charged voluntarily returns to this State, and thereby submits his person to the jurisdiction of the courts of this State, we see no reason why he may not be tried and punished for any violation of the personal rights of any of the citizens of this State, entitled to the protection of its laws, even though the act by which such violation was caused was originally put in motion beyond the limits of the State, provided the effect thereby intended reached the person for whom it was intended while in this State. If the defendant procured the pills in Washington, and transmitted them by mail to the said Colie Fowler, with the advice for them to be taken for the purpose of bringing about an abortion, and she received and took them in this State, in contemplation of law it was the same thing as if the defendant, in person, had brought the pills to Columbia, and there delivered them to Colie Fowler; for while it is quite true, as a general proposition, that the principal is not liable criminaliter for the unlawful act of his agent, yet, if the act done by the agent is in pursuance of the authority of the principal,—done by his authority,—the principal is liable. This doctrine has been expressly recognized and acted upon by the courts of this State in the case of *State v. Anone*, 2 Nott & McC. 27, where the owner of a store or shop was convicted of trading with a slave, though the act of trading was done by a clerk, in his employment, in the absence of the employer; the evidence being sufficient to show that such trading was authorized by the employer. The same doctrine was also fully recognized in the case of *State v. Borgman*, Id. 34, and *State v. Williams*, 3 Hill (S. C.), 94, though in the last two cases the defendants escaped conviction solely on the ground that the evidence was insufficient to show that the employer had authorized or directed the clerk to do the unlawful act charged. Upon the same principal, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered to Colie Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills, to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency

of the mail to do the act which he desired to have done, and which was done by his express authority and direction, in this State. So far as we are informed, there is no authority in this State as to the question of jurisdiction, but authorities elsewhere, which, though not binding upon us, are entitled to the most respectful consideration, have been cited to show error in overruling the plea to the jurisdiction. It seems to us that the authorities thus cited do not support defendant's contention; and, on the other hand, we find authorities elsewhere supporting the views which we have taken, as will be presently shown.

It is conceded in the argument for appellant, and properly conceded, as the authorities abundantly support the proposition, that "if one sends an infernal machine from one State to another, or shoots from one to another, and kills a human being, or sends poison from one State to another, to be administered to a person, and the result is the destruction of human life, such offender may be tried in the State where the death happened;" but the attempt is made by appellant's counsel to show that this proposition of law applies only in cases where the offence charged is an offence at common law, and does not apply in a case like the present, which is a mere statutory offence. It would unnecessarily protract this opinion to consider whether the crime of abortion was an offence at common law, or is a mere creature of statute,—a question which does not seem to be very clearly settled by the authorities; and we will assume for the present that abortion is a mere statutory offence, and proceed to consider whether the proposition above quoted from appellant's argument is limited to offences at common law, and does not apply to cases like the present, in which, as we have assumed, the offence charged is of mere statutory origin. Two cases have been cited to sustain the distinction sought to be drawn by counsel for the appellant: *State v. Knight*, Tayl. (N. C.) 44, and *People v. Merrill*, 2 Parker, Crim. R. 590. An examination of Knight's Case will show that the facts are not fully reported, and the headnote shows that the only point there decided was that "the legislature of this State cannot define and punish crimes committed in another State,"—a proposition which no one will dispute. From reading the case it would appear that the defendant was indicted under a North Carolina statute, which recites in its preamble that

there is reason to apprehend that evil-disposed persons, resident in the neighboring States, make a practice of counterfeiting bills of credit of the State, and, by themselves or emissaries, utter or vend the same, with an intention to defraud the citizens of this State, and proceeds to enact that all such persons shall be subject to the same modes of trial, and, upon conviction, to the same punishment, as if the offence had been committed within the limits of the State; but the case does not show that the defendant was charged with uttering or vending such counterfeit bills, either in person or by his emissaries, within the limits of the State of North Carolina. On the contrary, it may be inferred that the charge was for uttering or vending such counterfeit bills outside of the limits of the State, for the manifest object of the statute was to protect the credit of the State, and there is not a word in it that seems to contemplate that, in order to constitute the offence denounced, the circulation of such bills must be within the State. We are unable, therefore, to see what application the case has to the case now under consideration. In *Merrill's Case* the defendant was indicted for a violation of a statute declaring that any person who shall sell a person of color, who shall have been forcibly taken, inveigled, or kidnapped from the State of New York, shall, upon conviction, be punished as therein prescribed. It appeared that the defendant had inveigled a person of color from the State of New York to the city of Washington, and there sold him, and it was held that the courts of New York had no jurisdiction, because the offence charged was committed beyond the limits of the State of New York. It will be observed that the gist of the offence charged was the sale of the person falling within the class described in the statute, and, as that took place beyond the limits of the State of New York, it, of course, followed that the court of New York had no jurisdiction. The inveigling was no part of the offence charged in the count upon which the case turned, but was nothing more than one of the elements in the description of the person whose sale was forbidden by the section under which that count of the indictment was framed; and there was another section in the same statute which made it a distinct offence to inveigle a person of color from the State with intent to sell him, under which the court said the courts of New York would have jurisdiction. We

do not see, therefore, how appellant can derive any support from Merrill's Case. It seems to us that all of the cases cited by appellant's counsel to sustain the point now under consideration decide nothing more than the broad proposition, which no one will dispute, that the courts of one State cannot take jurisdiction of offences committed in another State; but the question here is whether the offence was, in the eye of the law, committed within the limits of this State. It seems to us that the authorities which we will now cite sustain the view which we have taken, in a previous part of this opinion, that, in the eye of the law, the offence charged was really committed here, although the defendant, Morrow, was in the city of Washington when, through an innocent agent, the United States mail, he transmitted the drugs to Colie Fowler, while in this State, with intent to cause the abortion charged, and which, by his advice, were used by her here. In 1 Bish. Crim. Law, sec. 110, that eminent author says: "The general proposition, therefore, is that no man is to suffer criminally for what he does out of the territorial limits of the country; yet one who is personally out of the country may put in motion a force which takes effect in it, and in such a case he is answerable where the evil is done, though his presence is elsewhere. Thus, if a man, standing beyond the outer line of our territory, by discharging a ball over the line, kills another within it; or, himself being abroad, circulates, through an agent, libels here; or in like manner obtains goods by false pretences; or does any other crime in our own locality against our laws,—he is punishable, though absent, the same as if he were present." Counsel for appellant questions this proposition, or rather the illustration given, so far as it implies, by the language "or does any other crime in our own locality against our laws," that the proposition is applicable to statutory as well as common-law offences, and has undertaken to show that all the authorities cited by the author to sustain the text are either civil cases, or cases charging common-law offences, except the case of *Barkhamstead v. Parsons*, 3 Conn. 1, which was a *qui tam* action. Conceding this to be true, we do not see how this can help the appellant, unless some authority can be found which recognizes the distinction sought to be drawn between statutory and common-law offences in this respect; and we do not find any such authority,

nor are we able to perceive any sufficient reason for any such distinction. The mere fact that the cases cited by Mr. Bishop to sustain the legal principles which he lays down happen to be cases of the character claimed by appellant cannot affect the legal principle, which is, substantially, this: that a person may commit an offence within this State by putting in motion a force which takes effect here, or by acting through innocent agents here, although the party charged may never have been personally present in this State. To the same effect, see 1 Whart. Crim. Law, secs. 278, 604. These distinguished text writers are sustained by numerous cases, some of which we will cite. In *People v. Adams*, 3 Denio, 190, affirmed by the court of appeals in 1 N. Y. 173, the indictment substantially charged the defendant with obtaining money under false pretences, in violation of a statute of the State of New York. The allegation, in substance, was that the defendant, by exhibiting a receipt, purporting to be signed by a forwarding agent in Ohio, for certain produce to be forwarded to certain commission merchants in the city of New York, to such merchants, induced them to accept drafts drawn on them by defendant against such produce, which the commission merchants afterwards had to pay out of their own funds, the receipt exhibited being false and fraudulent. The defendant filed a plea to the jurisdiction, alleging that he was a citizen of Ohio and resident in that State at the time of the transaction referred to, and never had been in the State of New York. To this plea a demurrer was interposed, and was sustained, the court holding the offence of obtaining money by false pretences is committed where the false pretences are successfully used, and where the money is obtained, and that though the defendant was absent from the State of New York when the money was obtained by him, through innocent agents in that State, employed by defendant, the offence charged was, in the eye of the law, committed by defendant in the State of New York, through his innocent agents, although he was absent from the State at the time, and hence the plea to the jurisdiction could not be sustained. This case was elaborately and ably argued by very distinguished counsel, and their arguments, which are fully reported in 3 Denio, present a full review of the authorities. The same doctrine is recognized in *Reg. v. Garrett*, 22 Eng. Law & Eq.

611, where Lord Campbell, then chief justice, said: "A person abroad may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts." In *State v. Chapin*, 17 Ark., at pages 565, 566, it is said: "It is not necessary in all cases that a man should be actually present in this State to make him amenable to our laws for a crime committed here. If the crime is the immediate result of his act, he may be made to answer for it in our courts, though actually absent from the State at the time he does the act, because he is constructively present, or present in contemplation of law." And, again: "If a person absent from this State commits a crime here, through or by means of an innocent instrument or agent, it seems that the law would regard him as personally present, and hold him responsible for the offence." This case, as well as the case of *People v. Adams*, *supra*, recognizes the distinction between a case where a person abroad does an act here through a guilty agent and where the same act is done through an innocent agent or some inanimate agency; for in the former case, where the act is a felony, the guilty agent must be regarded as the principal felon, and the person abroad who employs him should be regarded as an accessory before the fact, and only punishable where he actually is, at the time he incites his guilty agent to do the act, here. Hence the cases cited by appellant to sustain such a distinction are not applicable to this case, as there is no pretence that the agency employed by the defendant, Morrow, to transmit the drugs from Washington to Colie Fowler, in Columbia, was a guilty agent. To sustain the general doctrine which we have announced, that a person abroad may commit a crime here through the agency of innocent persons here or inanimate instruments, see *Rex v. Brissac*, 2 East (New Ed.), 373; *Noyes v. State*, 41 N. J. Law, 418; *People v. Rathbun*, 21 Wend., at page 534. The judgment of this court is that the judgment of the Circuit Court be affirmed.

Com. v. Parker, 9 Metc. 263; *Com. v. Bangs*, 9 Mass. 386; *State v. Cooper*, 22 N. J. Law 52; *Mills v. Com.*, 13 Pa. St. 630; *Slattery v. People*, 76 Ill. 217; *Smith v. State*, 33 Me. 48; *Mitchell v. Com.*, 78 Ky. 204; *Dunn v. People*, 29 N. Y. 523; *Com. v. Wood*, 11 Gray 85; *State v. Howard*, 32 Vt. 380; *Com. v. Leach*, 156 Mass. 99; *Holland v. State*, 131 Ind.

508; Clark, p. 180; Bishop, Secs. 509, 769; Wharton, Sec. 592; Hawley & McGregor, p. 289.

NOTE.—Some statutes make the person advising the taking, supplying or administering articles for the purpose of procuring a miscarriage, guilty of an abortion.

Minn. Stat. 1894, Sec. 6545.

NOTE.—Also the woman taking the medicine or submitting to the use of the article with the intent of securing a miscarriage is guilty of a crime in some States, and in others of a felony.

Minn. Stat. 1894, Sec. 6546; N. Y. Penal Code, Sec. 295.

NOTE.—Some statutes make the willful killing of an unborn quick child, by an injury committed upon the person of the mother, manslaughter in the first degree.

Minn. Stat. 1894, Sec. 6446.

NOTE.—Some statutes make those administering, providing or advising a female, pregnant or not, to take any drug, medicine, etc., from which the death of the woman or child results, guilty of manslaughter in the first degree.

Minn. Stat. 1894, Sec. 6447.

NOTE.—But the woman using or submitting to the use of such, when death results to the child, is guilty of manslaughter in the second degree.

Minn. Stat. 1894, Sec. 6450.

NOTE.—Statutes also make the person manufacturing, giving or selling an instrument, drug, etc., for the purpose of securing a miscarriage, guilty of a felony.

Minn. Stat. 1894, Sec. 6549.

NOTE.—Statutes also make the keeping of indecent articles for the purpose of preventing conception for sale or distribution a misdemeanor.

Minn. Stat. 1894, Sec. 6572.

NOTE.—Also those who attempt to conceal the birth of a child by any disposition of the dead body are guilty of a misdemeanor.

Minn. Stat. 1894, Sec. 6548.

d.

Adultery.

Adultery is unlawful and voluntary sexual intercourse between parties one of whom is married.

STATE v. HUTCHINSON.

Supreme Judicial Court of Maine, 1853.

36 Me. 261.

APPLETON, J. The indictment in this case alleges that "Eleazer Hutchinson of Gardiner, in the county of Kennebec, on the first day of November, A. D., 1852, at Gardiner aforesaid, he, the said Eleazer Hutchinson, being then and there a married man and having a lawful wife alive, did commit the crime of adultery with Lucy Hersey, the wife of one Moses Hersey, by having carnal knowledge of the body of her, the said Lucy Hersey," etc. It is impossible to misunderstand the meaning of the language used in this indictment. One does not readily perceive what more is required to convey to an ordinary understanding a clear and distinct idea of the nature and character of the offence charged. It would savor more of niceness than of wisdom to discharge the defendant upon distinctions such as are raised in this case. In *State v. Tibbetts*, 35 Maine, 205, there was no allegation that the defendant was a married man, having a lawful wife alive, at the time when the offence was alleged to have been committed. In *Com. v. Reardon*, 6 Cush. 79, Dewey, J., says, "it is true, that if the party indicted is himself alleged to be a married man, the indictment will be good and sufficient in form, without any allegation that the person with whom he had sexual intercourse was a married woman. But it is no less true, that the indictment in such case may equally allege both the parties to the adultery to be married persons." In the present case the

allegation is full and distinct, that at the time set forth in the indictment the defendant was a married man. The offence is equally committed in such case, whether the woman is or is not married.

Exceptions overruled.

State v. Lash, 16 N. J. L. 380; *Buchanan v. State*, 55 Ala. 154; *Helfrich v. Com.*, 33 Pa. St. 68; *Miner v. State*, 58 Ill. 59; *Com. v. Call*, 21 Pick. 509; *State v. Wallace*, 9 N. H. 515; *Cook v. State*, 11 Ga. 53; *State v. Thurstin*, 35 Me. 205; *State v. Vallander*, 57 Minn. 225; *Walker v. State*, 15 So. 7; *Bish. Mar. & Div.*, Sec. 415; *State v. Armstrong*, 4 Minn. 335; *Com. v. Hassay*, 157 Mass. 415; *Clark*, p. 312; *Bish. I.*, Sec. 501; *Wharton*, Sec. 1717; *Hawley & McGregor*, p. 277; *The Penal Code of Pa.*; *Shields*, vol. I., 221, 222, 228, 401, 406.

NOTE.—Statutes vary in defining this crime. At common law and in some jurisdictions the offence is only committed when one of the parties is a married woman.

Minn. Stat. 1894, Sec. 6556; *State v. Armstrong*, 4 Minn. 335; *State v. Lash*, 16 N. J. L. 380; *Leviticus*, xx., 10; *Deuteronomy*, xxv., 22, 28; *Wharton*, Secs. 1719, 1720; *Hawley & McGregor*, p. 277.

e.

Abduction.

Abduction is the taking of a female child for marriage or prostitution, against her will or that of her lawful custodian.

Henderson v. People, 124 Ill. 607; *State v. Stoyell*, 54 Me. 24; *State v. Ruhl*, 8 Ia. 447; *People v. Demousset*, 71 Cal. 611; *State v. Jamison*, 38 Minn. 21; *State v. Wilkinson*, 121 Mo. 485; *People v. Parshall*, 6 Park Cr. Rep. 129; *State v. Gibson*, 19 S. W. 980; *Couch v. Com.*, 29 S. W. 29; *State v. Johnson*, 22 S. W. 463; *Bunfelle v. People*, 39 N. E. 565; Minn. Stat. 1894, Sec. 6529; *Wharton*, Sec. 586; *Clark*, p. 222; *Bishop I.*, Sec. 555; *Hawley & McGregor*, p. 165.

f.

Incest.

When persons within the degrees of consanguinity within which marriages are declared to be incestuous and void, intermarry or commit adultery, or fornication with each other, each has committed the crime of incest.

State v. Chambers, 87 Ia. 1; State v. Herges, 55 Minn. 464; Com. v. Goodhue, 2 Metc. 193; People v. Harden, 1 Park Cr. Rep. 344; Noble v. State, 22 Ohio St. 541; State v. Schaunhurst, 34 Ia. 547; Baker v. State, 30 Ala. 521; People v. Burwell, 63 N. W. 986; Porath v. State, 63 N. W. 1061; People v. Shutt, 56 Mo. 11; Minn. Stat. 1894, Sec. 6553; Bishop I., Sec. 502; Clark, p. 319; Wharton, Sec. 1749; Hawley & McGregor, p. 286.

g.

Sodomy, Bestiality, Buggery.

Sodomy, bestiality, buggery or the crime against nature, is unnatural copulation of two persons with each other, or of a human being with a beast.

People v. Hodgkin, 94 Mich. 27; Prindle v. State, 31 Tex Cr. R. 551; People v. Moore, 103 Cal. 508; Com. v. Dill, 160 Mass. 536; Proper v. State, 85 Wis. 615; Minn. Stat. 1894, Secs. 6554-6555; Bishop I., Sec. 503; Clark, p. 192; Wharton, Sec. 579; May, 203; 4 Blackstone Com., * pp. 205, 215 (Lewis's Edition).

h.

Fornication.

Fornication is the *willing* and *unlawful* sexual intercourse of an unmarried person with another.

Smithman v. State, 27 Ald. 23; State v. Rahl, 33 Tex. 77; Territory v. Jasper, 7 Mont. 1; Territory v. Whitcomb, 1 Mont. 359; Bish. I., Secs. 38, 39; Clark, p. 316; Wharton, Sec. 1747.

NOTE.—By the Minnesota statutes, if any man and a single woman cohabit, they are guilty of fornication.

Hood v. State, 56 Ind. 271; Minn. Stat. 1894, Sec. 6557.

i.

Gambling and Lotteries.

All the law respecting gambling and lotteries is found in the codes of the respective States, as they are purely statutory crimes.

State v. Moren, 48 Minn. 555; Minn. Stat. 1894, Secs. 6576, 6595; N. Y. Penal Code, Secs. 265, 460; Wharton, Sec. 1465 *et seq.*

5. CRIMES AGAINST RELIGIOUS LIBERTY.

a.

Sabbath Breaking.

Most jurisdictions have statutes defining what acts will constitute Sabbath breaking in that they violate the peace of the Sabbath.

Minn. Stat. 1894, Secs. 6558-6568; 2 Bish. Cr. Law, Sec. 1188; N. Y. Bish. I., Sec. 793; Wharton, Sec. 1431.

b.

Violating Sepulchre, etc.

Violating sepulchre and remains of the dead. At the common law it was a misdemeanor to sell a dead body for dissection or refuse its burial. It was also indictable to prevent a coroner from holding an inquest over a corpse; also the disinterring of a corpse was indictable.

Minn. Stat. 1894, Secs. 6558-6568; 2 Bish. Cr. Law, Sec. 1188; N. Y. Penal Code, Secs. 305-315; Wharton, Sec. 1432.

6. CRIMES AGAINST PROPERTY.

Acts interfering with the rights of property.

Crimes against property are acts interfering with the rights of property which either common or statutory law define and punish as crimes.

a.

Arson.

“Arson is the malicious burning of another’s dwelling house.”

(1) *Elements.*

(a) Burning.

The burning must consist in the consumption by ignition of a part of the realty.

PEOPLE v. HAGGERTY.

Supreme Court of California, 1873.

46 Cal. 354.

BY THE COURT. This appeal is from a judgment pronounced against the defendant after indictment and trial for the crime of arson. The fire was set in old rags, saturated with coal oil, and lying upon the floor of the house, but was quickly discovered, and put out. The defendant contends that there was not a sufficient burning of the house to constitute the crime of arson, and that he could rightfully have been convicted only of an attempt to commit arson.

Upon the question of what is a sufficient burning to constitute the crime, Mr. Bishop states the rule thus: “The word ‘burn’

enters into the definition of arson at common law; and it occurs in many statutes. It means to consume by fire. If the wood is blackened, but no fibres are wasted, there is no burning; yet the wood need not be in a blaze. And the burning of any part, however small, completes the offence, the same as of the whole. Thus, if the floor of the house is charred in a single place, so as to destroy any of the fibers of the wood, this is a sufficient burning in a case of arson." (Bishop on Criminal Law, sec. 325.) There was evidence tending to show that a spot on the floor was charred, so as to destroy the fibers of the wood by the fire set by the defendant; and there was no evidence directly contradicting that fact. To some of the witnesses, it is true, the spot appeared to be only blackened, and not charred. But we cannot say that the verdict was so contrary to the evidence as to justify us in reversing the judgment on that account.

Judgment affirmed.

Com. v. Tucker, 110 Mass. 403; *State v. Hall*, 93 N. C. 571; *Graham v. State*, 40 Ala. 659; *Blanchett v. State*, 24 S. W. 507; *Com. v. Van-Schaack*, 16 Mass. 104; *Com. v. Betton*, 5 Cush. 427; *Mary v. State*, 24 Ark. 44; 2 Bish. Cr. L., Secs. 8-21; 4 Bl. Com., * page 220 (Lewis's Edition); *Hawley & McGregor*, p. 174; *Clark*, p. 226; *Wharton*, Sec. 825; *May*, 49-54.

NOTE.—Burning hole in jail is arson.

Lockett v. State, 63 Ala. 5; *Luke v. State*, 49 Ala. 30.

Contra.—*People v. Cotteral*, 18 John. 115.

(b) Dwelling-house.

The house must be a dwelling house and includes every building within the curtilage.

PEOPLE *v.* TAYLOR.

Supreme Court of Michigan, 1851.

2 Mich. 250.

WING, J. The indictment in this case is founded upon section 3 of chapter 154, and section 1 of chapter 161, title 30 of

the revised statutes. The first named section provides that "every person who shall willfully and maliciously burn in the night time, any barn, stable, shop, or office, of another, within the curtilage of any dwelling-house," etc.

There are but two questions of any importance presented by the record for the judgment of the court. The first is whether the Circuit Court gave to the jury the correct definition of the term "curtilage;" the second is whether the court stated to the jury the true rule of law by which they should be governed, in deciding whether the defendant hired Grey to burn the barn. If the court was correct in its views as expressed on these points, it will not be necessary to spend any time upon the other.

The proof shows the relative position of the house, barn, and enclosures on the farm of Mr. Johns. The barn is alleged in the indictment to have been within the curtilage of the house. Does the proof support this allegation? This will depend upon the true meaning of the word curtilage. It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of enclosures and buildings constituting the homestead of the inhabitants of this country, and particularly of farmers. In England, the dwellings and out-houses of all kinds, are usually surrounded by a fence or stone wall, enclosing a small piece of land embracing the yards and out-buildings near the house, constituting what is called the court. This wall is so constructed as to add greatly to the security of the property within it; but as such precautionary arrangements have not been considered necessary in this country, they have not been adopted. Hence, the difficulty in this case of giving a correct interpretation to the statute, and of judging whether the barn as described by the witness, was within what was understood by the legislature as the curtilage of the house.

Jacobs in his Law Dictionary says: "Curtilage is a court-yard, back side, or piece of ground lying near and belonging to a dwelling-house, and though it is said to be a yard or garden belonging to a house, it seems to differ from a garden, for we find *cum quando gardino et curtilagio*." The definition given in

Shepherd's Touchstone (page 84), Cunningham's Law Dictionary, and Webster's, Johnson's and Walker's Dictionaries, is substantially the same. Mr. Bouviere in his Law Dictionary, defines it to be "a space of ground within a common enclosure, belonging to a dwelling-house." Mr. Chitty in his General Practice, 175, speaks of its having been defined as is stated by Jacobs. In the case of *Regina v. Gilbert* (1 Covington & Kirwan, 84), the barn was situated in an enclosure which was surrounded by a general fence, but the yard in which the barn stood was separated from the yard immediately about the house by a stone wall; it was held the barn was within the curtilage. Mr. Chitty, in remarking upon the various definitions that have been given to this word says: "In its most comprehensive and proper legal signification it includes all that space of ground and buildings thereon, which is usually enclosed within the general fence, immediately surrounding a principal messuage, out-buildings and yard, closely adjoining to a dwelling-house, but it may be large enough for cattle to be *levant* and *couchant* therein." The definitions of Bouviere and Chitty do not strictly agree with the other authors named, yet it may be gathered from them all, that a curtilage is not necessarily one enclosure, but that it may include more than one yard near the dwelling-house. The definitions of neither of the authors cited indicate that it is necessarily a yard which embraces the out-buildings, and yet it may be so; and in England it commonly is so, and the space about the house is spoken of as a court. In this case the barn stood eighty feet from the dwelling-house and nearly in range with it, east and west; it stood in a yard or lane with which there was a communication from the house by a pair of bars. The space of ground occupied by both buildings, and the buildings were such as are usually included in one enclosure in England. It is quite manifest from the statute that it was the intention of the legislature to protect dwelling-houses from the hazards of fire which might be set to a barn, office, stable or shop, standing near to the house, as well as to protect these other buildings; we think it is our duty to apply the words of the statute in such enlarged sense as will insure that protection to dwelling-houses as well as barns, etc., which it appears to us, was the manifest intention of the legislature to provide.

But the question after all, is, did the court mislead the jury by giving an inaccurate definition of the word curtilage? We think it did not. The definition read by the court from Webster, Johnson, and Walker accords with that given by the legal writers we have cited. It was the province of the jury to apply the law to the facts. The court was not bound to instruct the jury that there was no proof that the barn which was burned had stood within the curtilage of any dwelling-house, nor that the barn was not within the curtilage of a dwelling-house—there was proof before the jury upon that point, and it was their duty to consider it in connection with the law, and ascertain whether the barn had stood within the curtilage, as intended by the statute and defined by the court.

Let it be certified to the Circuit Court for the county of Oakland as the opinion of this court, that there is no error in the rulings, nor in the charge of the court to the jury as set forth in the record in this case, and that a new trial be denied.

THE STATE *v.* MCGOWAN.

Supreme Court of Errors of Connecticut, 1850.

20 Conn. 245.

CHURCH, Ch. J. The statute of this State prescribes the punishment of arson, but it does not define the crime. We look to the common law for its definition.

Arson, by the common law, is the willful and malicious burning of the house of another. The word house, as here understood, includes not merely the dwelling-house, but all out-houses which are parcel thereof. 1 Hale, 570. 4 Bla. Com. 221. 2 Russ. on Crimes, 551.

This information charges the accused with burning a dwelling-house, and the question in the case, is, whether the building, which was in fact burned by him, was a dwelling-house, within the meaning of the common law on this subject? That it was a dwelling-house, as distinguished from a building of any other kind, is certain.

The building is described to be one built and designed for

a dwelling-house, constructed in the usual manner. It was designed to be painted, but was not yet finished, in that respect, and not quite all the glass were set in one of the outer doors. The building had never been occupied, and it was not parcel nor an appurtenant of any other.

We think this was not a dwelling-house in such a sense, as that, to burn it, constituted the crime of arson. In shape and purpose, it was a dwelling-house, but not in fact, because it had never been dwelt in—it had never been used, and was not contemplated as then ready for the habitation of man.

Arson, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning, because it manifested in the perpetrator, a greater recklessness and contempt of human life, than the burning of any other building, and in which no human being was presumed to be. Such seems to be the spirit of the English cases on this subject, and especially the late case of *Elsmore v. The Hundred of St. Briavells*, 8 B. & C. 461. (15 E. C. L. 266.) 2 Russ. on Crimes, 556. In that case, Bayley, J., in speaking of the building therein described, says, "It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. There cannot be a doubt, that the building in this case, was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, though it was not inhabited. It was not therefore a dwelling-house, though it was intended to be one."

A dwelling-house once inhabited, as such, and from which the occupant is but temporarily absent, would not fall within the foregoing principle.

It may not be necessary to determine another question, made in this case—whether it appertained to the court or the jury to determine the character of the building? But we think it was the duty of the court to have instructed the jury as to the law of the matter, and leave it to them to say from the proof, whether the building was a house, within the meaning of the law thus explained.

The considerations we have now expressed, induce us to grant a new trial of this cause.

In this opinion the other judges concurred.

New trial to be granted.

People v. Orcutt, 1 Park Cr. Rep. 252; Smith v. State, 23 Tex. App. 357, 5 S. W. 219; Johnson v. State, 48 Ga. 116; State v. Toole, 29 Conn. 342; Com. v. Barney, 10 Cush. (Mass.) 478; McGary v. People, 45 N. Y. 153; Snyder v. People, 26 Mich. 105; Mulligan v. State, 25 Tex. App. 199; Pond v. People, 8 Mich. 149; Clark, p. 227; Wharton, Sec. 833; Hawley & McGregor, p. 174.

(c) Another's house.

The house must be *owned* by another.

SNYDER v. THE PEOPLE.

Supreme Court of Michigan, 1872.

26 Mich. 106.

COOLEY, J. The plaintiff in error was informed against for arson, which is charged to consist in the felonious burning, in the night time, of the dwelling-house of Mary A. Snyder. On the trial it appeared that Mary A. Snyder was his wife, and defendant (below) insisted that he could not be guilty of arson in burning her house. He also claimed to be the owner of the house, in fact, and this claim was submitted to the jury, who found against him. The prosecution, on the other hand, gave some evidence tending to show that defendant had separated himself from his wife, and given up his residence in the State. This evidence, however, did not become important on the trial, as the court instructed the jury that a husband might be convicted of arson in burning his wife's dwelling-house, though residing with her, and defendant was convicted accordingly.

The statute provides that, "Every person who shall willfully and maliciously burn in the night time, the dwelling-house of another," etc., shall be punished, etc.—Comp. L., sec. 5745. There are numerous decisions as to what is meant by the dwelling-house of another, as well at the common law as under like statutes to our own. Arson is an offence against the habitation, and regards the possession rather than the property. State v. Toole, 29 Conn., 344. The house, therefore, must not be de-

scribed as the house of the owner of the fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is. 2 East P. C., 1034; 4 Bl. Com., 220; Whart. Cr. L., sec. 1638; 2 Bish. Cr. L., 2d Ed., sec. 24; Holmes' Case, Cro. Car., 376; Spalding's Case, 1 Leach, 217; Commonwealth v. Wade, 17 Pick., 395. Even, it seems, though the occupation be wrongful. *Rex v. Wallis*, 1 Mood. C. C., 344; *State v. Toole*, 29 Conn., 344. It follows that a lessee could not be guilty of the felony in burning the premises occupied by him as such: 2 East P. C., 1029; 2 Russ. on Cr., 550; *McNeal v. Woods*, 3 Blackf., 485; *State v. Lyon*, 12 Conn., 487; *State v. Fish*, 3 Dutch., 323; *State v. Sandy*, 3 Ired., 570; 3 Greenl. Ev., sec. 55; while the landlord, during such occupation, might be. 2 East P. C., 1023-4; *Sullivan v. State*, 5 Stew. & Port., 175. A jail, it has been held, may be described as the dwelling-house of the jailer living with his family in one part of it. *People v. Van Blaricum*, 2 Johns., 105; *Stevens v. Commonwealth*, 2 Leigh, 683. And it seems that the wife, because of the legal identity with the husband, cannot be guilty of the offence in burning the husband's dwelling, even though at the time living separate from him. *March's Case*, Mood. C. C., 182. This would doubtless be so held whenever the wife's domicile is regarded in law as identical with the husband's, which for many purposes is no longer the case when they live separate.

It must be evident from this summary of the law on this subject, that if the husband, living with his wife, has a rightful possession jointly with her of the dwelling-house which she owns and they both occupy, he cannot, by common-law rules, be guilty of arson in burning it. It remains to be seen whether the statutes have introduced any changes which would affect the case.

The statutes upon which the question arises, are those for the protection of the rights of married women. But it is to be observed, that those do not in terms go beyond the ensuring to the wife such property as she may own at the marriage, and acquire afterwards, and the giving to her the power to protect, control and dispose of the same in her own name, and free from the interposition of the husband. None of them purports to operate upon the family relations; none of them takes from the husband

his marital rights, except as they pertain to property, and none of them relieves him from responsibilities, except as they relate to the wife's contracts and debts. He is still under the common-law obligation to support the wife, and the services of the wife, which at the common law were regarded as the consideration for this support, are still supposed to be performed in his behalf and in his interest, except where they are given to her individual estate, or separate business. The wife has a right to receive her support at the husband's domicile, unless she has lost it by misbehavior, and husband and wife together have a joint interest in and control of the children, which they cannot of right sever, and which are not, even in contemplation of law, regarded as distinct, though the courts are sometimes compelled to treat them as if they were so, when difficulties arise which make legal intervention essential to the protection and welfare of the children. As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation, is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of the rights, or relieved of the obligations of head of the household, except as by their dealings and intent to that effect is indicated.

So far from an intent having been manifested on the part of the legislature to regard the family as simply a voluntary association of two persons, legally independent of each other, with their progeny, several of the changes have been in the direction of a unification of interests. Thus, the husband is deprived of all authority to sell, mortgage or otherwise charge the homestead without the wife's consent, though his title thereto may be complete and absolute. Const., Art. XVI., secs. 2, 3; *Dye v. Mann*, 10

Mich., 291; *McKee v. Wilcox*, 11 Mich., 358; *Ring v. Burt*, 17 Mich., 465. He is also precluded from selling or encumbering such personal chattels as are exempt by law from execution, unless with her assent (Comp. L., sec. 4465); and if he shall attempt to do so, she may bring action to recover the same in her own name. Comp. L., sec. 3294. These powers and privileges in respect to the husband's property are not conferred on the wife for her own benefit exclusively, or in order to give her interests independent of the husband; but they are given her for the benefit of the whole family, in order that they may not be deprived of the reasonable means of support which the law has endeavored to save to them, and to the end that they may be kept together as a family, if such shall be their desire. And after the death of the husband and father, the family unity is still regarded in the protection which is given to the homestead. Const., *ubi supra*.

We have said that the wife is entitled to support at the husband's domicile, and, as we have seen, she may prevent his disposing of it. The statute has not given him a corresponding right to impede or preclude conveyances or encumbrances by the wife, but nevertheless, so long as they occupy together, he is not to be considered as being upon the premises by sufferance merely. He is there by right, as one of the legal unity known to the law as a family; as having important duties to perform, and responsibilities to bear in that relation, which can only be properly and with amplitude performed and borne while the legal unity represents an actuality; as having rights in consort and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property which it has prudently denied to the husband; but none of it makes the husband a stranger in law in the wife's domicile. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling-house, the *domus*, is that of both.

If, therefore, the husband shall be guilty of the great wrong to his wife and family, of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at

the common law for a like wrong to the dwelling-house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house, in legal contemplation, as regards the offence under consideration, is the dwelling-house of the husband himself.

But, in so holding, we do not decide that if the family relation is broken up in fact, and husband and wife are living apart from each other, whether under articles of separation or not, the same exemption from criminal liability can exist. There is much reason for holding that the wife's dwelling-house can be considered that of the husband, only while he makes it such in fact, and that there is no such legal identity as can preclude her house being considered, in legal proceedings against him, as the dwelling of "another," when it is no longer his abode. That case was not fairly presented upon this record, and was barely alluded to on the argument; and it must be left for the proper consideration when it becomes necessary to decide it. We confine our attention now to the case of a husband in the practical exercise of the right to reside with his family in the wife's dwelling-house, which the wife, at the same time, practically concedes. In such a case the dwelling-house cannot be said not to be that of the husband.

It follows that the judgment was erroneous, and it must be reversed, and a new trial ordered.

The other justices concurred.

State *v.* Lyon, 12 Conn. 486; Bloss *v.* Tobey, 2 Pick. 320; State *v.* Hannett, 54 Vt. 83; People *v.* Greening, 102 Cal. 384; People *v.* Gates, 15 Wend. 159; Maley *v.* State, 31 S. W. 393; Clark, p. 228; Wharton, Sec. 830; Hawley & McGregor, p. 175.

NOTE.—In many jurisdictions it need not be the house of another.

Minn. Stat. 1894, Sec. 6668; State *v.* Hurd, 51 N. H. 176; Clark, p. 229.

NOTE.—In many jurisdictions statutes have very materially changed the common law principles pertaining to the crime.

By these statutes the degree of the defence and the severity of the punishment depend upon whether the premises are occupied at the time by a *human being*, and whether the act is committed in the night time.

If the burning is in the night time, of a dwelling house or any other structure in which there is a human being, it is arson in the first degree.

State *v.* Grimes, 50 Minn. 123; Minn. Stat. 1894, Sec. 6668; N. Y. Penal Code, Sec. 486; Clark, p. 231.

NOTE.—If it is in the day time, or of a building in the night time in which there is no human being, the burning of which endangers a building in which there is a human being, or of a car, vessel or structure occupied ordinarily at night by a human being, though no person is in it at the time, then it is arson in the second degree.

Minn. Stat. 1894, Sec. 6669; N. Y. Penal Code, Sec. 487; Clark, p. 231.

NOTE.—The third degree generally consists in the burning of property to obtain the insurance money, and all other willful burnings as will not be arson in the other degrees.

Minn. Stat. 1894, Sec. 6670; N. Y. Penal Code, Sec. 488; Clark, p. 231.

NOTE.—These statutes define night time to equal the time between sunset and sunrise.

N. Y. Penal Code, Secs. 488, 492; Minn. Stat. 1894, Sec. 6673.

NOTE.—A building to be any house or vessel or other structure suitable for affording shelter for human beings, or appurtenant to or connected with a structure so adapted.

N. Y. Penal Code, Sec. 493; Minn. Stat. 1894, Sec. 6674.

NOTE.—An inhabited building is one, any part of which has usually been occupied by a person lodging therein at night.

Minn. Stat. 1894, Sec. 6675; N. Y. Penal Code, Sec. 492.

b.

Burglary.

“Burglary at common law is the breaking and entering of the dwelling house of another in the *night time* with the intent of committing a *felony therein*.”

(1) *Elements.*

(a) Breaking.

To constitute the crime some breaking is essential, but the slightest is sufficient.

McGRATH *v.* STATE.

Supreme Court of Nebraska, 1889.

25 Neb. 780; 41 N. W. 780.

REESE, Ch. J. The county attorney of Douglas county filed an information in the District Court, charging plaintiff in error with the crime of burglary.

To this information he pleaded not guilty, and upon a trial being had he was found guilty and sentenced to the penitentiary.

The cause is brought to this court by proceedings in error; the only assignments of error being, that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, and that the court erred in overruling the motion for a new trial.

The motion for a new trial was based upon the ground that the verdict was not sustained by sufficient evidence, and was contrary to law.

It appears from the testimony of Mr. Joseph Lowe, that, at the time of the commission of the alleged burglary, he and one John Woods were residing in a room on Douglas street, in the city of Omaha, and that upon the evening of the commission of the alleged crime, at about the hour of nine o'clock, Mr. Lowe went into his room, first unlocking the door thereof, and when in the room he discovered the form or outline of some one therein, and at the same time came in contact with him; that he withdrew from the room, when the door was closed by the person within, and which became locked by a spring lock. After withdrawing from the room Mr. Lowe requested another person, who was in a room below, to turn on the alarm for the police, when he returned up the stairs toward the room where the person was. He was soon followed by the individual who had called for the police, and informed that the person in the room was perhaps "going out the back way." He then went around to the rear of the building, when he saw plaintiff in error come out of the second story window in the rear of the house, and who came to the rear fence, climbed over, and as he did so, he was caught by Mr. Lowe, and turned over to the police.

This testimony was, to a great extent, denied by plaintiff in error upon the witness stand, although he admitted the arrest in the alley at the rear of the building.

Assuming the testimony of Mr. Lowe to be true, and that there is no doubt of the identity of plaintiff in error with the person in the room, it becomes necessary to inquire whether or not the facts proven will sustain the verdict and judgment.

Section 48 of the criminal code provides that, "if any person shall, in the night-season, willfully, maliciously, and forcibly

break and enter into any dwelling-house, * * * with intent to kill, rob, commit rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary," etc.

In order to establish the commission of this crime, the person charged must be proven to have forcibly broken and entered the building referred to in the information.

The witness, Lowe, testified that the door was locked, and that plaintiff in error "must have got in over the transom." That they found marks of where he had got in where the dust had been removed, and "where he had slid down the door."

It appears that the transom over the door was open, and that the entry was made by climbing over the door and through it. There is no proof that the window through which plaintiff in error made his escape was closed, or that he had opened it.

The cause was evidently tried upon the theory that going through the open transom was sufficient breaking, as the third instruction given by the court to the jury was as follows:

"3d. To constitute a crime of burglary, there must be either actual or constructive breaking. You are instructed that, if in this case you believe from the evidence beyond reasonable doubt that the prisoner went into the complaining witness' room over the transom, closed or unclosed, or that he gained access to the house by lifting the latch of a door, for the purpose and with the intent of stealing and committing a felony, then you should find him guilty, but if you do not so believe then you should acquit."

It will be observed by the language of the section of the criminal code above quoted, that no definition of the word "break" is given, but that the common law form of, "maliciously and forcibly break and enter," is used.

The rule is well settled by all the writers upon the subject of criminal law, as well as substantially all the decisions, that to commit a burglary at common law, or under the language of a statute similar to ours, there must be a breaking and an entry. That the breaking must be actual, and not arise from a mere legal construction. And that an entry by an open door or window is not a burglary.

The force mentioned in the statute does not imply a destruction of any part of the building, or even the breaking of a latch

or lock. The opening of a door or window or casement; the picking of the lock of the door, or unlatching and opening a door; the bending aside of nails, or otherwise unloosing fastenings, may be burglary. But some kind of a breaking is necessary, except, perhaps, where the thief enters through a chimney which cannot be further enclosed. See Maxwell's Criminal Procedure, 104. 2 Russell on Crimes, 2. Harris' Criminal Law, 208. Tiffany's Criminal Law, 611. Desty's Am. Crim. Law, sec. 141 B. Wharton's Am. C. L., sec. 1532. Am. and Eng. Enc. of Law, Title Burglary.

There being no proof of a forcible breaking and entry, it follows that the verdict of the jury was not sustained by sufficient evidence, and a new trial must be had.

The judgment of the District Court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

TIMMONS v. STATE.

Supreme Court of Ohio, 1878.

34 Ohio St. 426.

THE plaintiff was indicted, convicted, and sentenced for burglary in the court below.

The entire testimony in the case is not brought upon the record, but the tendency of so much thereof as is necessary to an understanding of the question made is set out. From this, it appears that the prisoner was found in the dwelling-house of the prosecuting witness in the night-time; that the doors of the house were still locked when the prisoner was found therein; that the only means of ingress was through the transom over the door; that the transom was found open when the prisoner was found in the house; "that the transom swings on its hinges like an ordinary door;" that there was a button for fastening it, but that the transom was closed, by the wife of the prosecuting witness, on the evening of the night of the entry, with a broom, but she did not fasten it with the button.

The court charged: "That if the jury was satisfied, beyond a reasonable doubt, as to all the other elements necessary to constitute a burglary (which were explained) except a breaking, and found that the said transom was closed on the night in question, though not fastened, and that the prisoner used sufficient force to push it from its place, so that it would swing open, that that was a sufficient breaking in law, and that their verdict under these circumstances, if satisfied beyond a reasonable doubt, should be guilty."

It is assigned for error that the court erred in the part of its charge, as to the force that will constitute a breaking in burglary.

GILMORE, J. It is contended, in argument by counsel for plaintiff in error, that there is, in this case, an element of negligence on the part of the owner of the house entered, which, under the circumstances disclosed in the record, rendered the offence charged a trespass and not a burglary.

The law on the point is, that if the owner leaves his doors open, or partly open, or his windows raised, or partly raised and unfastened, it will be such negligence or folly on his part, as is calculated to induce or tempt a stranger to enter; and if he does so through the open door or window, or by pushing open the partly opened door, or further raising the window that is a little up, it will not be burglary. 4 Blackstone, 226; Comm'rs v. Stephenson, 8 Pick. 354.

But we do not see how this doctrine can have any application here. The testimony tended to prove that in this case the house was securely fastened in every respect, except as to the transom in question, and that it was closed. There is in this no evidence of such negligence on the part of the owner as could have induced or tempted the prisoner to enter. Nor are we at liberty to adopt the suggestion of counsel that the transom, after being closed, may have been opened by currents of air within or without, or by other sufficient causes, and that the prisoner may thus have been tempted to enter through the open transom, for the jury found that the transom was closed, till it was pushed open by the prisoner. There was, therefore, no such negligence on the part of the owner of the house as affects the question in this case in any way.

This brings us to the only question in the case. Did the court err in charging the jury that if the transom was closed, though not fastened, and the prisoner used sufficient force to push it from its place, so that it would swing open, that that was a sufficient breaking in law?

Our statute, defining burglary, provides: "Whoever, in the night season, maliciously and forcibly breaks and enters any dwelling-house," etc. The word forcibly is not used in the common-law definition, in which the words are "break and enter." But in our statute the word forcibly only expresses the degree of force that was implied at common law from the word break. Hence, under statute, as at common law, there may be a constructive forcible breaking, as where an entrance is obtained by trickery or deception. *Ducher v. The State*, 18 Ohio, 308.

We may, therefore, look to the principles of the common law in determining what will constitute a forcible breaking under our statute.

In England, for more than two hundred years it has been settled that there can be no burglary without an actual breaking. And in Sir Matthew Hale's time (1 Hale's P. C. 552) these acts amounted to an actual breaking, viz: "Opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, and to put back the leaf of a window with a dagger," etc.

In *Brown's Case*, decided in 1799 (2 East's P. C. 489), there was an aperture communicating with an upper floor, which was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening, so that those beneath could push them open at their pleasure by a moderate exertion of strength. It was held that the pushing open of these folding doors was sufficient to constitute a breaking.

And it has subsequently been held (1 Moody's C. C. 377) that the lifting of a flap of a cellar, usually kept down by its own weight, is a sufficient breaking for the purpose of burglary. And in *Rex v. Hall*, 2 R. & Ry. C. C. 355, it is held that where a window opens upon hinges, and is fastened by a wedge, so that

pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. And in *Rex v. Haines*, Ib. 450, it is decided that the pulling down of the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley-weight; it is equally a breaking although there is an outer shutter which is not put to. In *Rex v. Hyams*, 7 Car. & Payne, 441, it is held that raising a window which is shut down close, but not fastened, though it has a hasp which might have been fastened, is a breaking of a dwelling-house.

These authorities clearly show that only a slight degree of force is necessary to constitute a burglarious breaking at common law.

The following American cases are to the same effect as *Rex v. Hyams*, above cited. *The State v. Boon*, 13 Iredell, 244; *Frank v. The State*, 39 Miss. 705; *The People v. Edwards*, 1 Wheeler's Cr. C. 371.

The principle, as laid down in the cases above cited in 2 East and 1 Moody's C. C., as to the cellar or flap doors kept down by their own weight, is followed in the case of *Dennis v. The People*, 27 Mich. 151, where it is held, that an entry into a building by raising a transom window, attached by hinges above, and arranged to fall into the frame by its own weight, when the window was shut into the frame, so as to require some force to open it, is a sufficient breaking, under the statute of that State punishing the breaking and entering an office, shop, etc., in the night time.

No court or text writer has undertaken to define the exact degree of force that is necessary to constitute a breaking in burglary; nor indeed would it be practicable to do so. The law on the subject is found in decided cases in which it is announced in connection with a given state of facts, to which it is applied; and, in that way, reasonable certainty has been attained as to what facts will, or will not, in most cases, constitute a burglarious breaking. But there are cases in which the facts are of such a character as to render it difficult to determine whether, in law, they constitute a burglary or a trespass.

But, from the cases above cited, it is plainly the law that where no force is used, as in entering through an open door or window, there is no breaking, and, hence, only a trespass.

On the other hand, where only slight force is used, as where a flap door, or a window is closed down and kept in place only by its own weight, the force that is necessary to vertically raise it so as to effect an entrance, is sufficient to constitute a burglarious breaking.

There may exist an appreciable difference between the force that would be required to vertically raise a window that was closed and held down by its weight and that which would be required to push open a closed, but unfastened transom, that swings back horizontally on hinges, as in the case before us; and, admitting there is such a difference, the question is, whether the force required to accomplish the latter is sufficient to constitute a burglarious breaking? We think an affirmative answer may safely be given.

The application of the law does not depend upon the degree of the force used, but upon the fact that force of some degree, however slight, was used. The force required to push open the transom in question was undoubtedly slight, but still must have been an appreciable force, sufficient to overcome the friction of the hinges, occasioned by the weight of the transom, and this, under the circumstances, is all that the law requires.

The case of *The State v. Reid*, 20 Iowa, 413, is in point. It is there decided that "the pushing open of a closed door, with the intent expressed in the statute, is a sufficient breaking, within the meaning of the law, to constitute burglary."

We find no error in the charge of the court, under which the jury had to find that the transom was pushed from its place, which implies some degree of force, before they could find the prisoner guilty; and this finding is not before us for review on the evidence.

Motion overruled.

People v. Dupree, 98 Mich. 26; *People v. Nolan*, 22 Mich. 229; *State v. Moore*, 22 S. W. 1086; *State v. O'Brien*, 81 Ia. 93; *Walker v. State*, 52 Ala. 376; *Donohoo v. State*, 36 Ala. 281; *Com. v. Stephenson*, 8 Pick. 354; *Sparks v. State*, 29 S. W. 264; *People v. Curley*, 99 Mich. 238; *State v. Johnson*, 34 La. Ann. 48; *Robinson v. State*, 53 Md. 159; *Sims v. State*, 36 N. E. 278; *State v. Moore*, 117 Mo. 395; *Cole v. People*, 37 Mich. 544; *Pitcher v. People*, 16 Mich. 142; *Harris v. People*, 44 Mich. 305; *Clark*, p. 232; *Bish.* II., Sec. 91 *et seq.*; *Wharton*, Sec. 758; *Hawley & McGregor*, p. 177.

NOTE.—The breaking may be constructive, as where one obtains an entrance by subterfuge; and an entry by an artifice is a breaking under the code.

State v. Rowe, 98 N. C. 629; Nicholls v. State, 68 Wis. 416; State v. Mordecai, 68 N. C. 207; Johnston v. Com., 85 Pa. St. 54; Ducher v. State, 18 Ohio 308; Minn. Stat. Sec. 6680; N. Y. Penal Code, Sec. 499; Clark, p. 234; Wharton, Sec. 759; Hawley & McGregor, p. 180.

(b) Entry.

An entry by any part of the person or tool, by which it is sought to accomplish the felony, is sufficient; but the entry of the tool to complete the breaking is not sufficient.

FRANCO v. STATE.

Supreme Court of Texas, 1875.

42 Tex. 276.

GOULD, J. This is an appeal from a conviction for burglary, the questions presented being, first, was the entry complete, and secondly, was there sufficient evidence of the intention of appellant to commit a theft. The evidence is to the effect that about four o'clock in the morning, appellant had raised the window in the dwelling of an aged lady, and was holding it up with his hand in such a way that his fingers were within the house, his elbow resting on the sill of the window, and his body outside of the house, when some of the inmates hearing the noise and approaching, he suddenly dropped the window and fled. The house contained "property of value," and it was testified that there was no enmity existing between appellant and any of the family. On being arrested next morning, appellant denied that it was he, and on the trial an effort was made to establish an *alibi*; but the evidence appears sufficient to justify the jury in finding that he was the man who was detected at the window.

The following are Articles of the Code (Paschal's Digest):

Article 2359. The offence of burglary is constituted by entering a house by force, threats or fraud, at night, or in like manner,

by entering a house during the day, and remaining concealed therein until night, with the intent in either case of committing a felony.

Article 2360. He is also guilty of burglary, who, with intent to commit a felony by breaking, enters a house in the day-time.

Article 2361. The entry into a house within the meaning of Article 2359, includes any kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent; it is not necessary that there should be any actual breaking to constitute the offence of burglary, except when the entry is made in the day-time.

Article 2362. The entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony; or it may be constituted by the discharge of fire-arms, or other deadly missiles, into the house, with the intent to injure any person therein; or it may be constituted by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced.

Article 2363. By the term breaking, as used in Article 2360, "is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand, or any instrument to draw out the property through an aperture made for that purpose."

In "common language," we do not say that one has entered a house, who has merely, in the act of raising a window from without a building and holding it up with his hand, placed his fingers in the inner side of the window, and therefore within the house. But the Code says: "The entry is not confined to the entrance of the whole body." In the opinion of a majority of my brethren, this extends the meaning of the word as used in the definition of burglary, so as to embrace a case like the present, where only the fingers were actually within the house. According to the common-law authorities such an act would be an entry sufficient to constitute burglary. (See *Rex v. Davis*, Russell & Ryan, 499; *Rex v. Briley*, Id., 341.)

It is contended for appellant, that the clause immediately following the one just quoted, reading thus: "It may consist of the

entry of any part for the purpose of committing a felony," qualifies what precedes it, so that the entry of a small part of the body is not a complete entry, unless it be intended by that act or agency to commit the felony. The court holds this to be only an example, one case in which the entry of less than the whole body, viz: "any part," completes the act, the general design being to commit a felony, and that the effect of the whole is to make the entrance of any part of the body, however small, an entry within its meaning—provided always that the intention be to commit a felony.

As to the second question, the fact that the house was broken and entered at the time and in the way it was, by one who fails to show any excuse, that there was valuable property there to be taken, and no other known desired object, are sufficient to support the finding of the jury that the intent was to steal. Roscoe says, the intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front of the clock. They put a crowbar and a knife through a window, but the owner resisting them, they went away. Being indicted for burglary with intent to commit a larceny, it was contested that there was no evidence of that intent; Mr. Parke, J., said that it was for the jury to say whether the prisoner went with intent alleged, or not; that persons do not in general go to houses to commit trespass in the middle of the night; that it is matter of alleviation that they had the opportunity but did not commit the larceny, and he left it to the jury to say whether, from all the circumstances, they could infer that or any other intent. (Roscoe on Ev., p. 367, ref. to 1 Levin, C. C. 37.) The case referred to is not accessible, but Archbold, in a note, refers to it and cites it in the same words. That author says, even the very fact of breaking and entering in the nighttime, raises a presumption that it is done with the intent of stealing. Numerous cases might be cited where convictions appear to have been had and sustained without further evidence. (See *Rex v. Price*, R. and R., 450; *Rex v. John Smith*, Id., 416. See also Wharton, Am. Cr. Law, Section 1600.) Where under such evidence as there is in this case a jury have found that the intent of the party was to commit theft, the verdict will not be set aside as unsupported.

The judgment is affirmed.

Donahoo v. State, 36 Ala. 281; Walker v. State, 63 Ala. 49; State v. McCall, 4 Ala. 643; Mitchell v. Com., 11 S. W. 209; Olds v. State, 12 So. Rep. 409; Com. v. Glover, 111 Mass. 395; Clark, p. 255; Hawley & McGregor, p. 181; Bishop II., Sec. 91 *et seq*; Wharton, Sec. 774.

NOTE.—“Enter” defined by the codes.

Minn. Stat. 1894, Sec. 6682; N. Y. Penal Code, Sec. 388.

(c) The Intent.

The breaking and entry must be with the intent to commit a felony, which must exist at the time both of the breaking and entering.

PRICE v. THE PEOPLE.

Supreme Court of Illinois, 1884.

109 Ill. 109.

MR. JUSTICE MULKEY delivered the opinion of the court:

On the 28th of June, 1883, Freeman Price, impleaded with James Moran and Abel Lindohl, was tried and convicted in the Henry county Circuit Court for the crime of burglary, the jury fixing the term of his confinement in the penitentiary at three years. A motion for a new trial having been made and overruled, the defendant was sentenced by the court to the penitentiary for the period fixed by the verdict. The accused having brought the case here for review, asks a reversal of the conviction, mainly on the ground it is not supported by the evidence.

The transaction upon which the indictment is based occurred about half-past six o'clock in the evening of the 9th of March, 1883, at the dwelling-house of John Milroy, on his farm near the county line between Knox and Henry counties. Milroy testifies that at about the time indicated some one rapped at his door and inquired the road to Woodhull, a village some two or three miles distant; that about half an hour afterwards there was another rap at the door, and his wife, Mrs. Milroy, asked who was

there, to which the party rapping replied, "It is me;" that she then inquired if it was Pete, meaning one of the neighbors, and receiving an affirmative answer, she thereupon opened the door, when three men, with cloths tied over the lower part of their faces, walked in, and one or all of them presented pistols, and said, "Your money or your life;" that witness stepped into the kitchen to get a spade to defend himself with, where he was followed by the largest one, who subsequently proved to be Moran; that upon witness drawing a spade on Moran, the latter presented a pistol, but did not shoot, nor did witness strike with the spade; that Mrs. Milroy remained in the first room with the other two; that upon their ordering her to get a light she did so, and handed it to one of them, and then passed through the pantry down into the cellar, and from thence out of doors, when she screamed for help; that the parties thereupon left, without having got any money or other valuables. The three persons who thus entered the house were the accused and his co-defendants, and it is conceded that the latter entered the house of Milroy, as stated, for the purpose of robbing him; but the plaintiff in error insists, and we think the evidence tends strongly to show the fact, that his object in accompanying them was to expose the contemplated crime, and bring the real perpetrators of it to justice, and whether this is so or not is really the only question in the case.

The gist of the offence charged is the intent with which the plaintiff in error entered Milroy's house. The indictment charges it was with the intent to steal, and it is conceded the facts, as testified to by Milroy and his wife, are amply sufficient to make out a case against the accused, if there was no evidence explanatory of the criminating facts occurring at the house, and testified to by them, and it is therefore unnecessary to detail more particularly what transpired there. Judging the case by what occurred at Milroy's house alone, the plaintiff in error does not stand in any better position than his co-defendants, who are confessedly guilty, and have not therefore joined in the writ of error. The defence set up by the former is in the nature of a plea of confession and avoidance. If he was really, as he claims, acting the part of a mere detective in accompanying the other two on their criminal mission, it is a matter of no significance that no difference could be seen in his conduct and the other two

at Milroy's house, for to have acted his part well that would reasonably be expected. To have merely stood by as though he were a silent spectator, would doubtless have excited the suspicions of his comrades, imperiled own safety, and possibly have defeated the very object he claims to have had in becoming one of the party. The turning point in the case then is, is the evidence tending to show plaintiff in error was acting in the affair merely as a detective, sufficiently strong to raise a clearly well founded doubt of his guilt? If so, he ought not to be convicted.

The accused testifies the first intimation he had of an intention to rob Milroy he obtained from Moran, who came to him and asked him to help rob an old man near Woodhull; that witness said to him first, "that is not my business," but afterwards said, "I will see about it;" that Moran came to him again, about four months ago, and asked him to go, when he said, as before, "I will see about it." The witness was then asked whether or not he advised with Mr. Byers in reference to going with Moran. This and other questions of similar import were propounded to the witness, all of which, on objection by the People, were held improper, and the witness was not permitted to answer them. The evidence shows that Byers, the individual referred to, was an attorney, and also a justice of the peace, and it was clearly erroneous to not permit the witness to answer the questions. It is clear enough the object of the inquiry was to show that he gave notice to an officer of the law of the intended breach of the Criminal Code, which would have strongly negated any criminal intent on his part in going. It is also well settled one may prove his own declarations, when made just before or at the time of starting to a particular place, for the purpose of showing his motives or object in going.

But the error in excluding this evidence was, perhaps, cured by the subsequent testimony of the witness. Further on in his testimony, in answer to the question, "Did you take any steps, after you were informed of the intended robbery, to prevent it?" the witness states that he did, by informing Van Riper, the constable, and Mr. Byers; that on the day of the robbery he called Van Riper out of Frederick's store, into the back room, and told him two young men were going to rob an old man, and also told

him what Byers had said. The witness then proceeds in these words: "I said, you (meaning Van Riper) had better telegraph to Woodhull and have the officers ready for them. He said, 'It won't do. Let them go on, and if they steal anything they will be caught. If they see the officers, they'll skip.' I told him these two, and another from Oneida, were going to rob Milroy; that they were going at 1.40 on that day. I told him to have officers at Milroy's house. This was in Frederick's store, in Altona. Milroy's house was eight or twelve miles from Altona." In answer to the further question, "Did you call on any one else that day, and inform them of the intended robbery?" the witness replied, "Yes; I saw Martin, the jeweler, of Altona, and I was at Byers' house for that purpose. I told Van Riper in the forenoon, and told him what Byers had told me about it. I told him I had spoken to Byers, and that Byers had said, 'Let me know when these men are to do this,' and I said I would. I said to him, 'Shall I work with them?' and he said yes. The conversation with Byers was at six or seven o'clock the night before the talk with Van Riper, and the talk with Van Riper was in the forenoon of the day we went to Milroy's. Byers is the man that told me to help them, and encouraged me."

While Byers denies that Price told him of the intended robbery before it occurred, yet he admits he called at his office next morning and told him all about what had happened, and through the information thus given the parties were arrested that day. Moreover, Colonel Buswell, ex-sheriff of the county, testifies to a conversation with Byers, the next morning after the attempted robbery, in which the latter told him all about the affair, and witness states as his best recollection that Byers said Price had told him of the intended robbery before the attempt was made. Mrs. Adams, the mother of Price, also testifies that in a conversation she had with Byers, after the attempted robbery occurred, the latter said, referring to her son, "He did not do as he (Byers) told him; that he went into the house, when he told him to stay out." She further states that her son told her all about the affair next morning, after it occurred. The details of this witness' conversation with Byers, as given by her, notwithstanding she is the mother of the accused, are so natural and free from anything indicating they might have been manufactured for the occasion, as

to irresistibly carry with them the conviction that her statement is true. Moreover, certain concessions are made by Byers, on cross-examination, which we think strengthen her testimony. He fully corroborates her as to the time, place and occasion of her conversation with him, and while he denies that Price told him beforehand of the intended robbery, yet in testifying to his interview with Colonel Buswell, he used this language: "I did not tell him (Buswell) that Price came to me and told me of the intended robbery. I think I told him that Bob did not act as I had told him to." That Price told the constable, Van Riper, of the intended robbery before and on the day it was attempted, and that Price visited Byers on the same day, as he claims, for the purpose of communicating the same fact to him, is not at all disputed. The constable fully corroborates Price's statements as to the conversation with him in the back room of Frederick's store, on the day of the attempted robbery. Van Riper, referring to Price, says: "He called me in the back room of Frederick's store, and said he had something to tell me; that there was to be a racket at Milroy's, and wanted me to get a squad of men and arrest them," etc.

Waiving all controverted questions, the undisputed facts, as appears from the foregoing, are, that the accused, on the day of the attempted robbery, went deliberately to a constable of the town in which he lived and told him all about the contemplated crime, giving the true names of the parties, and telling him when and where it was to take place, and the name of the intended victim; that the attempt was made at the very time and place, and by the parties, stated by him, and that on the following morning he, in like manner, went to a justice of the peace and told him all about what had been done, and furnished him with the true names of the parties implicated, by means of which, on the same day, they were brought to trial, and were subsequently convicted of the crime. That a same person, really guilty of committing so grave a crime as the one imputed to the accused, would thus act, is so inconsistent with all human experience as not to warrant the conviction of any one under the circumstances shown. The accused is a mere youth, only some nineteen years of age at the time of this transaction, and the fact that some of his conduct subsequent to the occurrence tends rather to

strengthen the view taken by the jury, as is conceded, yet that may well have resulted from his youth and inexperience. But as to the exculpatory facts above stated, we see no rational solution of them, and none that is satisfactory has been suggested by counsel for the People which would seem to warrant the conviction.

The judgment of the Circuit Court is therefore reversed, and the cause remanded for further proceedings not inconsistent with what is here said.

Judgment reversed.

State v. Moore, 12 N. H. 42; *State v. Fox*, 80 Ia. 312, 45 N. W. 874; *State v. Beal*, 37 Ohio St. 108; *Lanier v. State*, 76 Ga. 304; *Clark*, p. 238; *Bishop II.*, Sec. 109 *et seq.*; *Wharton*, Sec. 810; *Hawley & McGregor*, p. 186.

NOTE.—By some statutes an intent to commit any crime is sufficient.

Jones v. State, 63 Ga. 141; *Com. v. Glover*, 111 Mass. 395; *State v. Morris*, 47 Conn. 179; *Jones v. State*, 11 N. H. 269; *McCourt v. People*, 64 N. Y. 583; *Osborne v. People*, 2 Park 583; *State v. Cowell*, 12 Nev. 337; *Minn. Stat.* 1894, Sec. 6677.

(d) The House.

The house must, at common law, be a dwelling house or an out building within the curtilage.

ARMOUR v. STATE.

Supreme Court of Tennessee, 1842.

3 Humph. 379.

TURLEY, J. delivered the opinion of the court.

The prisoner was indicted and convicted in the Circuit Court of Giles, for the offence of burglary.

The proof as contained in the bill of exceptions, shows that the building in which the supposed offence was committed, was a store-house in which the prosecutor carried on the business and trade of vending and selling merchandise: that it had two out

doors, one facing the public square in the town of Cornersville on the south, the other a public street on the east; that his dwelling or mansion-house was on the same lot, enclosed by a paling, coming up to the two opposite corners of the store-house, the dwelling-house being twenty-nine or thirty feet distant from the store-house, that the store-house and mansion-house were on the same lot, and belonged to him in his own right; that there was no connection between the dwelling-house and store, by the roof or any covered way; that there was a small gate immediately fronting his mansion-house to the east, and also a large gate for wagons between that gate and the store-house, through which he hauled his wood; that there was also a small gate immediately fronting his mansion-house; that there was a back door in the end of his store opening into the yard toward his mansion through which he generally passed from his mansion to his store-house; that he kept coffee and sugar in his store for sale, and that when his family needed these articles, they came to the store and got them, that he sometimes kept flour for sale in the store, and that his family came and got of it when wanted; that there were no separate and distinct parcels kept for his family use, but that it was always taken out of that kept for sale; that he sometimes kept his saddles in the store-house, but that for more than twelve months prior to the night of the burglary, there had been no one living in the house, and that no one during that time had slept there.

And the question is, whether this store-house be such a dwelling-house or part or parcel thereof, as a burglary can be committed in. On this point the judge charged, "That to constitute the offence of burglary, the breaking and entering must be of a mansion-house, that every house or permanent edifice for the dwelling or habitation of man is taken to be a mansion-house, in which burglary may be committed, and that the term mansion-house includes the out-houses, such as ware-houses, stables, cow-houses or dairy-houses, though not under the same roof or joining contiguous to the dwelling-house, provided they be parcel thereof; and that any out-house within the curtilage and not in fact used as part or parcel of the mansion-house, for instance a barn, a stable, a dog-house or any other building, although within the

curtilage, if it be unoccupied or not used in connection with the dwelling-house, or as part thereof, it would not be such a house as burglary could be committed in; that the term curtilage was defined to be a yard or piece of ground lying near to and used with the dwelling-house, and embraced within the same common enclosure, and that a store situate within the curtilage as thus defined and used as a store-house, for the purpose of merchandise, and connected with the principal mansion or dwelling-house and having entrance with it, would be a parcel of the mansion-house and be the subject of burglary."

This charge is not sufficiently precise if it be not erroneous; more no doubt from the intrinsic difficulty of the subject than any thing else, and was certainly not calculated to give the jury accurate information of the matter in controversy, if it be not calculated to mislead them. It will become necessary for us to examine the nature of the offence charged to have been committed, with the view of ascertaining how far the charge of the circuit judge is correct, and whether the finding of the jury is supported by law. The dwelling-house of an individual hath peculiar sanctity in the estimation of the common law. It hath been called his castle and hath many privileges attached to it. Persons are prohibited under severe penalties from at any time entering it, unless under absolute necessity in a few particular cases, without the owner's consent, and offences committed in it by strangers have always been more severely punished than if committed elsewhere.

The offence of burglary, which can be committed in no other place, and which may be complete, although the person designing it, may be frustrated in his attempt, is a felony at common law without benefit of clergy, and is with us a high crime, punishable by a long confinement in the penitentiary. It becomes important then to see that this privilege, the infraction of which leads to such serious consequences, be not extended beyond what necessity requires and the law designs.

Lord Coke defines a burglar to be "he that in the night time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not."

It must be proven that the premises broken and entered were either a mansion-house or parcel of a mansion-house. Every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed. 3 Inst. 64-5; 2 East, P. C. 491. There is not, and never has been any difficulty in ascertaining what constitutes a mansion or dwelling-house; but in as much as it has been held that a dwelling-house at common law not only included the premises actually used as such, but also such out buildings as were within the curtilage or court-yard surrounding the house, great difficulty has been frequently experienced in deciding what buildings come within this protection, and very nice distinctions have been taken on the subject, so much so, that it is impossible to extract any general principle from the cases—and it would be a hopeless task, to think of examining and comparing them, with the view of reconciling them. So serious has this difficulty been felt in England, that the statute of 7th and 8th George 4th, ch. 29, has been passed to remedy the evil, by which it is provided, that “no building although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be a part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage, leading from one to the other.”

But this statute not being in force in this country, we are left to extract our rule of action from the common law as we best may. The design is to protect the peace and quiet of one's place of abode by day and by night—and no extension of a principle, enforced by such heavy penalties, ought to be made beyond what will give such protection in a fair and adequate manner. To hold that every house which may be built in a curtilage or court-yard of any extent, whether necessary to the enjoyment of the dwelling-house or not, whether used for family purposes or not, and entirely disconnected from the mansion-house, except by a common wall or fence, is part and parcel of the dwelling-house, is absurd—and not warranted as we think by a fair construction of the cases—though, as has been observed, it is difficult if not impossible to amalgamate them. As it is the dwelling which is protected, when the principle comes to be extended to a build-

ing not attached thereto but distinct and separate from it, upon what principle can it be held to be the subject of the burglary—unless it be that it is *quasi* a dwelling-house? and how can it be such, unless used for domestic purposes, or purposes necessary for the complete enjoyment of the dwelling?

Hawkins in his *Pleas of the Crown*, page 104, says: "All outbuildings, such as barns, stables, dairy-houses, etc., adjoining to a house are looked upon as a part thereof." The words, etc., upon no principle of fair construction can be held to mean other than those of the same class spoken of, to wit: offices attached to the dwelling-house, and intended for the comfort and convenience of the owner, to be used in housekeeping and not for a distinct and separate purpose altogether, as for trading or manufacturing.

Archbold in his *Treatise on Criminal Law*, page 286, says: "The term dwelling-house includes in its legal signification, all out-houses occupied with and immediately communicating with the dwelling-house." Can a house used for other than domestic purposes, be said to be occupied with the dwelling-house? Surely not, for the complete and ample enjoyment of either does in no degree depend upon the other. Shall it be said that a man has not complete and ample enjoyment of his dwelling-house, if he be disturbed in that of his handicraft shop, his ware-house for the storage of other people's merchandise, his store-house for the retailing of goods, although these may be in the curtilage, but distinct and separate from his mansion? We think not—we know of no principle justifying such a position, but hold the law to be, that an out-house, though within the curtilage is not a part or parcel of the mansion or dwelling-house, unless it be used by the family or some part of it, and for purposes designed to promote the comfort, enjoyment and ease of those engaged in housekeeping. And that if the building be used for purposes wholly distinct and separate, as it is, when it is wholly appropriated to manufacturing, or to buying and selling, no burglary can be committed in it. We are not without express authorities to this point. In the case of the *State v. Bryant Ginns*, 1 Nott & McCord, 583, it is held by the Constitutional Court of South Carolina, "That to break and enter by night a store-house in which no one sleeps, which has no internal communication with the

dwelling-house, and is unconnected with it, except by a fence, is not burglary." Mr. Justice Nott, who delivered the opinion of the court, says: "A house to be a parcel of the mansion-house, must be some how connected with or contributory to it, such as kitchen, smoke-house, or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and distinct use. I admit that a store will be so considered if in a part of the house, or under the same roof, or if any of the family sleep in it. And this view I think is supported by the best authorities on the subject." In the case of the State v. Henry A. Langford, 1 Devereux (North Carolina) Rep. 253, it is held, "that burglary can only be committed in a dwelling-house or such other buildings as are necessary to it as a dwelling. Therefore, it is no burglary to break the door of a store situate within three feet of the dwelling-house and enclosed in the same yard." Judge Henderson, who delivered the opinion of the court, says: "The law throws a mantle around the dwelling of a man, and protects not only the house in which he sleeps, but also all others appurtenant thereto as parcel or parts thereof, from meditated harm. Thus the kitchen, laundry, smoke-house, and the dairy are within its protection, for they are all used as parts of one whole, each contributing in its way to the comfort and convenience of the place as a mansion or dwelling-house; they are used with that view and that alone, and it may be admitted that all houses contiguous to the dwelling are *prima facie* of that description. But where it is proved that they are used for other purposes, for labor, as a work-shop; for vending goods, as a store-house—this destroys the presumption. It then appears that they are there for purposes unconnected with the actual dwelling, and do not render it more comfortable or convenient as a dwelling. In short they are not a part or parcel thereof, but are used for other and distinct purposes, unconnected with the actual dwelling; the house as a dwelling is equally comfortable and convenient without them, as with them. These principles I think are fully recognized by authority."

These two cases are directly in point; they are decided by courts of very respectable authority. We think they are supported by reason, and are not at war with English precedent, and

we are disposed to go with them. Such then being the law, it will be perceived at once, that the charge of the judge below is not sufficiently specific, and in some respects erroneous; and that the verdict of the jury is not supported by the testimony.

The judgment of the Circuit Court will, therefore, be reversed, and the case remanded for further proceedings.

Hollister v. Com., 60 Pa. St. 103; *Fisher v. State*, 43 Ala. 17; *State v. Outlaw*, 72 N. C. 598; *State v. Potts*, 75 N. C. 129; *Mason v. People*, 26 N. Y. 200; *People v. Dupree*, 98 Mich. 26; *State v. Sufferin*, 6 Wash. 107; *People v. Aplin*, 86 Mich. 393; *People v. Griffin*, 77 Mich. 585; *State v. Mordecai*, 68 N. C. 207; *State v. Garrison*, 52 Kan. 180; *State v. King*, 25 S. E. 613; *Clark*, p. 236; *Wharton*, Sec. 815; *Hawley & McGregor*, p. 182; *Bishop II.*, Sec. 104.

NOTE.—Some statutes make any building, any part of which is usually occupied by a person lodging therein at night, a dwelling house.

Minn. Stat. 1894, Sec. 6683; *State v. Williams*, 90 N. C. 724; *Colbert v. State*, 17 S. E. 840; *N. Y. Penal Code*, Sec. 502.

NOTE.—Different parts of a lodging house used by separate tenants are by the statutes separate dwelling houses.

Minn. Stat. 1894, Sec. 6684; *Reed v. State*, 31 S. W. 404; *N. Y. Penal Code*, Sec. 503.

(e) Night Time.

To constitute a burglary at common law, the breaking and entry to commit the felony must be in the night time. Night time is from sunset to sunrise.

PEOPLE v. GRIFFIN.

Supreme Court of California, 1862.

19 Cal. 578.

NORTON, J. delivered the opinion of the court—FIELD, C. J. and COPE, J. concurring.

The defendant was convicted of the crime of burglary. By the statement on appeal it is agreed, that on the trial it was proved as one of the facts, that the breaking and entering the dwelling-house, etc., which constituted the offence, was done be-

tween the hours of six and seven o'clock in the afternoon, on the thirty-first day of August, and that at the time there was light enough out of doors to discern a man's features across the street. As the sun at that date did not set until about half-past six o'clock, it does not appear that it was proved by the prosecution that the offence was committed in the night time. Besides, the presence of sufficient daylight to discern a man's features has long been adopted as a criterion to determine whether or not the act was done in the night time within the meaning of the law applicable to the crime of burglary. (4 Bl. Com. 299; Com. v. Chevalier, 7 Dana Abr. 134; State v. Bancroft, 10 N. H. 105.) On the facts proved, as agreed to in the statement, the offence in this case was not burglary, and as the verdict was against law, a new trial should have been granted.

Judgment reversed and cause remanded.

Jackson v. State, 38 S. W. 990; Oshford v. State, 53 N. W. 1036; State v. Bancroft, 10 N. H. 105; State v. Morris, 47 Conn. 179; Jones v. State, 63 Ga. 141; Com. v. Glover, 111 Mass. 395; Lewis v. State, 16 Conn. 32; Com. v. Williams, 2 Cush. 582; Minn. Stat. 1894, Sec. 6681; Clark, p. 237; Wharton, Secs. 806-807; Hawley & McGregor, p. 185; Bishop II., Sec. 102.

NOTE.—By some statutes there are three degrees of burglary.

The first is where a person, with intent to *commit therein a crime*, breaks and enters a dwelling house in *the night time*, while there is a *human being therein*.

1. Being armed with a *dangerous weapon*.
2. Arming himself *therein with such a weapon*.
3. Being assisted by a *confederate*. Or
4. Who, while attempting to commit such a crime, *assaults any one*.

Minn. Stat. 1894, Sec. 6677; People v. Kruger, 100 Cal. 523.

The second is where a person, to *commit some crime therein*, breaks and enters the dwelling house of another, in which *there is a human being*, under circumstances not amounting to a burglary in the first degree.

Minn. Stat. 1894, Sec. 6678.

The third, where a person, with intent to commit a crime therein, breaks or enters a building or room, or, being in any building, commits a crime therein and breaks out.

Minn. Stat. 1894, Sec. 6679.

NOTE.—By statute, in case a person enters a building in a manner not amounting to burglary, with intent to commit a felony therein, he is guilty of a misdemeanor.

Minn. Stat. 1894, Sec. 6686.

NOTE.—A person may be punished for the crime committed within the building, as well as for burglary. He may be punished for each crime separately.

Minn. Stat. 1894, Sec. 6687.

C.

Forgery.

“Forgery is the fraudulent making or alteration of a writing to the prejudice of another’s right.”

REMBERT v. THE STATE.

Supreme Court of Alabama, 1875.

53 Ala. 467.

THE appellant was tried and convicted on an indictment which charged that he, “with intent to defraud,” forged an instrument in writing, in words and figures, as follows: “Due 8.25. Askew Brothers,” meaning thereby that there was due the bearer of said instrument, from said Askew Brothers, a firm composed of Samuel H. Askew and Warren S. Askew, the sum of eight dollars and twenty-five cents.

The defendant demurred to the indictment, on the grounds, “1st, that the instrument in writing, alleged to be forged, is invalid on its face, creates no liability, has no legal tendency to effect a fraud, and cannot be the subject of forgery; 2d, that the instrument alleged to be forged creates no legal liability against any person whatever, and is not a bill, note, check, certificate, or other evidence of debt; and that the meaning of the instrument cannot be ascertained from the words and figures thereof.” The court overruled the demurrer, and its ruling is now relied on as error fatal to the conviction.

BRICKELL, C. J. There are numerous definitions of the offence of forgery, not perhaps substantially differing. We adopt, as comprehensive and precise, that given by Mr. Bishop: “For-

gery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Crim. Law, sec. 495. Mr. Bishop observes: "The principal point for consideration is, that the instrument must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; or, in other words, must be legally capable of effecting a fraud." *Ib.* sec. 503. If the writing has this capacity, it is not necessary the fraud should have been consummated; the offence is complete without the concurrence of damage or injury. *Jones v. State*, 50 Ala. 161.

If the writing is void on its face, illegal in its very frame, it has not the capacity of effecting a fraud, and is not the subject of forgery. An illustration given by Mr. East is Wall's case, who was convicted for forging and altering a will of land, purporting to be attested by only two, the statute of wills requiring the attestation of three witnesses. The judges held the conviction wrong, because the instrument on its face was void, incapable of working injury, and no extrinsic facts could impart to it validity. 2 East's Crown Law, 953. So, in *People v. Galloway*, 17 Wend. 540, a deed of lands made by a *feme covert*, conveying her own real estate, the deed on its face disclosing the facts, and not purporting to be acknowledged in the mode prescribed by the statute to give it validity, was declared not the subject of forgery. The forgery of a certificate of a private individual, that a slave was a freeman, not if genuine being evidence of the fact certified, imposing no duty, and conferring no right, was not the offence denounced. It was not the fabrication of an instrument which could affect property. *State v. Smith*, 8 Yerger, 150. Such an instrument doubtless might have been the ingredient of a cheat, if injury had ensued from it; but being of no legal efficacy, either apparent or which could arise from extrinsic facts, it was not sufficient to constitute the offence of forgery. The false making a bill of exchange, void by statute, will not constitute the offence. *State v. Jones*, 1 Bay, 205; *Moffatt's Case*, 2 East's Crown Law, 954.

This general rule, that if the instrument is void on its face, it is not the subject of forgery, must be taken with this limitation: when the instrument does not appear to have any legal

validity, or show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offence is complete, and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. *State v. Briggs*, 34 Vt. 503. The fact that the paper is incomplete or imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts. In all indictments for forgery at common law, it was necessary to set out the instrument, so that it would judicially appear to the court that it was the subject of forgery. When the instrument is complete, perfect, and not void on its face; and when it is spoken of as void, is intended illegal in its very frame, or innocuous from its character, as in the case of the will not properly attested, or the void bill of exchange, or the certificate worthless as evidence, or the deed void because of the incapacity of the grantor, its criminal character was disclosed to the court. When the instrument is imperfect, incomplete, and its real meaning and terms are not intelligible from its words and figures, but are to be derived from extrinsic facts, and its capacity to injure is dependent on such facts, then, when such facts are averred, and the instrument, its meaning and purport, made intelligible to the court, it appears judicially, with as much certainty as if the extrinsic facts were on the face of the instrument, and that set out *in hæc verba*, whether it has the vicious capacity, and is the subject of forgery. *Carberry v. State*, 11 Ohio St. 411; *Commonwealth v. Ray*, 3 Gray, 448; *State v. Wheeler*, 19 Minn. 98 (S. C. 1 Green's Crim. R. 541); *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *Reed v. State*, 28 Ind. 396; *Commonwealth v. Hinds*, 101 Mass. 211; *People v. Stearns*, 21 Wend. 413. In this last case the principle is thus stated: "The indictment must show the forgery of an instrument which, on being described, appears on its face naturally calculated to work some effect on property; or, if it be not complete for that purpose, some extrinsic matter must be shown, whereby the court may judicially see its tendency. As an instance of the latter, suppose a man has the custody of property, which he agrees to deliver, on the owner sending him certain words under his hand,

which have no respect to property, but which are a secret sign agreed upon between them, and known only to them. Such words would be the subject of forgery within the statute; but not being significant, and it not being conceivable how mischief would ensue from their use, the custody of the goods and the agreement on the words must be shown in the indictment. But suppose a letter by which the writer requests another to deliver 'my purse of gold' or 'my package of bankbills' to A. B., are not the court capable of seeing at once how the forgery of such an instrument may work a fraud; and hence would not the allegation that the letter was counterfeited, with the usual general averment that the act was with the intent to defraud, be sufficient?" The true inquiry is, not whether the instrument on its face is uncertain, incomplete, and unintelligible, but is it void; if genuine, without regard to extrinsic facts, would it be invalid? The uncertainty and incompleteness may be removed or cured by reference to extrinsic facts; and when these are averred and proved, the offence is punishable as forgery.

The want of a payee, and the want of an expression in words, or in figures accompanied by the dollar mark, of the sum acknowledged to be due, are the defects which it is insisted render the instrument forged void. No statute declares such an instrument void, and it certainly offends no principle of the common law for the maker to acknowledge in that form his indebtedness either to the person to whom the acknowledgment is delivered or to some other person who may be expected to receive it. It is merely uncertain and incomplete, and that it has the vicious capacity to defraud depends wholly on extrinsic facts. If these are averred, and disclose this capacity, the indictment is sufficient; and proof of the facts will authorize conviction. Suppose the instrument genuine, and the defendant suing the makers, Askew Brothers, on it, averring in his complaint the facts averred in the indictment, can it be doubted the complaint would be sufficient, and proof of the facts entitle him to a recovery?

Under our statute, the instrument would import a consideration, and its execution could only be denied by a sworn plea; nor could the ownership of the plaintiff, averred in the complaint, be put in issue otherwise than by a sworn plea. The court would by

intendment supply the dollar mark, omitted in expressing the sum acknowledged to be due, rather than treat the instrument as void for uncertainty. *Murrill v. Handy*, 17 Mo. 406; *Northrop v. Sanborn*, 22 Vt. 433; *Evans v. Steel*, 2 Ala. 114; *White v. Word*, 22 Ala. 442; *Butler v. State*, 22 Ala. 43. Courts are very reluctant to pronounce written instruments void for mere uncertainty. When words are omitted, which from the very nature of the instrument can be supplied with certainty, the legal construction and operation of the instrument is the same as if they had been expressed. No one can doubt, if *Askew Brothers* had made and delivered to the defendant a genuine instrument, in the words and figures of the false instrument, that the courts, *ut res magis valeat quam pereat*, would have supplied by intendment the defects which it is insisted now render the instrument void.

If on its face the instrument is so uncertain that it does not appear to be the subject of forgery, capable of working injury, the averments of the indictment cure the defect, and place the instrument just where it would stand if these facts were expressed on its face. It would then be an instrument creating a pecuniary demand, and its false making forgery in the second degree, under the statute. R. C. sec. 3702.

There was no error in overruling the demurrer to the indictment, and the judgment must be affirmed.

People v. Warner, 62 N. W. 405; *Com. v. Baldwin*, 11 Gray 197; *State v. Stratton*, 27 Ia. 420; *People v. Graham*, 6 Park Cr. Rep. 135; *Jones v. State*, 50 Ala. 161; *State v. Young*, 46 N. H. 266; *Barnum v. State*, 15 Ohio 717; *Clark*, p. 292; *Bish. I.*, Sec. 572; *Wharton*, Sec. 653; *Hawley & McGregor*, p. 225.

NOTE.—Statutes generally to-day prescribe what instruments are subject to forgery, and make degrees of the crime according to the nature of the instrument forged.

Minn. Stat. 1894, Secs. 6690-6707; N. Y. Penal Code, Secs. 509-526.

d.

Larceny.

Larceny is "The felonious taking and carrying away of the personal goods of another."

(1) *Elements.*

(a) Personal Property.

Personal property alone is subject to larceny.

STATE v. BURT.

Supreme Court of North Carolina, 1870.

64 N. C. 619.

THERE was a special verdict, finding: that there was a verbal contract between Burt and the owner of a gold mine, that the former might run a rocker in such mine, paying a certain rent; that the other defendants were working with Burt; that one of these employees found a nugget of gold lying upon the land of the owner of the mine, on the top of a rock pile, not a part of the proceeds of the rocker; and that, after consultation with the other defendants, it was appropriated to their own use, and was never accounted for to the owner.

His Honor thereupon gave judgment for the defendants, and the solicitor for the State appealed.

DICK, J. Nuggets of gold are lumps of native metal, and are often found separated from the original veins. When this separation is produced by natural causes, there is no severance from the realty, but such nuggets will pass under a conveyance, like ores and minerals which are embedded in the earth. When ores and minerals are taken out of mines with expense, skill and labor, to be converted into metals, or used for the purposes of trade and

commerce, they become personal property, and are under the protection of the criminal law.

In England, ores, even before they are taken from the mines, are protected by highly penal statutes: St. 7 and 8 George IV., amended by 24 and 25, Vict. Loose nuggets which are occasionally found in gullies and branches, and in woods and fields, are hardly considered by the law as the subjects of determinate property, until they are discovered and appropriated, and then they become personal goods, and are the subjects of larceny. In this respect they somewhat resemble treasure trove, waifs, etc., in the criminal law of England.

It is an ancient rule of the common law, that things which savor of, or adhere to realty, are not the subject of larceny. In this respect the common law was very defective, and did not afford sufficient protection to many valuable articles of personal property which were constructively annexed to the realty. These defects have, in some degree, been remedied by a number of statutes in this country and in England.

These beneficial changes were induced by the necessities of progressive civilization, which required many valuable species of personal property to be annexed to realty, to be used for the purposes of trade and manufacture, and in the arts; and which needed the constant protection of the criminal law.

In a case like ours, there is no necessity for the court to depart from the ancient technical strictness of the common law, and there is no need of any additional legislation upon such a subject. In public estimation it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate it to his own use, although found upon the land of another person. Hundreds of instances of this kind have doubtless occurred, and yet no case can be found of a prosecution for larceny on this account, either in the courts of this country or of England. This fact sustains us in the opinion, that for cases like the one before us, there is no necessity to depart from the ancient landmarks established by the fathers of our criminal jurisprudence. The nugget was found upon a loose pile of rocks by one of the defendants, and the taking and carrying away was one continued act, and did not amount to larceny, but was only a civil trespass: 1 Hale P. C. 510; 2 East. P. C. 587; Roscoe Crim. Ev. 459; 2 Russell on Cr. 136; 2 Bish. Cr. Law, s. 779.

There was no error in the ruling of his Honor, and the judgment must be affirmed.

Per Curiam.

Judgment affirmed.

State v. Fitzpatrick, 9 Houst. 385, 32 Atl. Rep. 1072; State v. House, 65 N. C. 315; State v. Taylor, 27 N. J. L. 117; Com. v. Beaman, 8 Gray 497; Com. v. Chace, 9 Pick. 15; Smith v. Com., 14 Bush (Ky.) 31; Hutchison v. Com., 82 Pa. St. 472; Ward v. People, 6 Hill (N. Y.) 144; People v. Williamson, 35 Cal. 671; Com. v. Steimling, 156 Pa. St. 400, 27 Atl. 299; State v. Musgang, 51 Minn. 556; Ransom v. State, 22 Conn. 152; Minn. Stat. 1894, Sec. 6709; State v. George, 60 Minn. 503; Clark, p. 243; Wharton, Sec. 862; Bishop II., Sec. 761 *et seq.*; Hawley & McGregor, p. 198.

NOTE.—At common law, dogs, cats, ferrets, etc., not being property, could not be stolen, but in many jurisdictions statutes make anything of value property.

Mullaly v. People, 86 N. Y. 365; People v. Campbell, 4 Parker Cr. Rep. 386; Haywood v. State, 41 Ark. 476; Hurley v. State, 33 Tex. App. 333; N. Y. Penal Code, Sec. 718; Minn. Stat. 1894, Sec. 6709; Clark, p. 244; Wharton, Sec. 872; Hawley & McGregor, p. 199.

NOTE.—The ownership must be in another than the thief, but one may steal from one enjoying only a special property interest.

State v. Allen, 103 N. C. 433, 9 S. E. 626; State v. McRae, 111 N. C. 665, 16 S. E. 173; Com. v. Greene, 111 Mass. 392; Clark, p. 246; Bishop II., Sec. 788 *et seq.*; Wharton, Sec. 936; Hawley & McGregor, p. 200.

(b) The Act.

There must be a trespass in the taking, and the taking must be from the possession of another, but it need not be secretly done, nor with force or intimidation, for then it would be a robbery.

HARRISON v. THE PEOPLE.

Court of Appeals of New York, 1872.

50 N. Y. 518.

FOLGER, J. The plaintiff in error was indicted for simple larceny. The jury, having found him guilty, have fixed upon him

the felonious intent. The questions raised in this court, are presented by an exception to a refusal of the court, to charge the jury that they could not convict of any other offence upon the testimony, than an attempt to commit larceny; and an exception to the charge delivered to the jury, that the removal of the property from where it was deposited was sufficient carrying away to constitute larceny if it was of a felonious character.

Had the coat of the witness, Bull, with the pocketbook in it, been off his back, hanging on a hook, the act of the plaintiff in error with felonious intent would, beyond question, have been larceny. Thus, in one case the prisoner, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and, both holding it, endeavored to pull it out, but were prevented by the guard. The prisoner being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. (Walsh's Case, 1 Moody Crown Cases, 14.) And in 2 Russell on Crimes, 153 (margin 6, 4th ed., Lon.), this case purports to be cited from the MS. of Bayley, J.; and in the foot note (i) the text is said to correspond accurately with that of the MS.; and it is there said; "That if every part of the thing is removed from the space which that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient; so, drawing a sword partly out of its scabbard will constitute a complete *asportavit*."

Here, by the testimony, the pocketbook was lifted a space of three inches from the bottom of the pocket, and every part of it was removed from the space which that part occupied before the plaintiff in error touched it.

But it is claimed that the article being on the person of Bull, and in his actual possession, there is thereby a difference; and that there must be a severance of the goods from that possession. And *Rex v. Thompson* (1 Moody Crown Cases, 78), is cited. The prisoner was there indicted for stealing from the person a pocket-book and contents. The book was in an inside front pocket of the owner's coat. The book was just lifted out of the pocket, an inch above the top of the pocket. By the forcible act of the

owner the hand of the prisoner was brushed away, and the book fell back into the pocket. The prisoner was convicted and had the sentence for that offence. It was insisted that this did not amount to a taking from the person. Six of the ten judges who sat in review held that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of the judges were of the contrary opinion. But the ten were of one mind that the simple larceny was complete, and recommended a reduction of the sentence. A distinction, it seems, was taken between stealing from the person and a simple larceny; and all that the case holds to the benefit of this plaintiff in error is that such an act is not a stealing from the person. As above stated, he is not indicted for stealing from the person, but for feloniously stealing, taking and carrying away this property against the form of statute in such case made and provided. (2 R. S., p. 679, sec. 63.) And the judgment of the court, sentencing him to State prison for a term of five years, is in accord with the statute as to the punishment for the offence for which he was indicted.

Moreover, in *Regina v. Simpson* (Dearsly Crown Cases, 421), which was a case of stealing from the person, *Jervis, C. J.*, questioned the case of *Rex v. Thompson* (*supra*), saying that he thought that the minority of the judges there were right; but that the majority might have thought that the outer coat which covered the pocket formed a protection to the pocketbook. And *Alderson, B.*, said there must be a removal of the property from the person; but a hair's breadth will do. *Regina v. Simpson* (*supra*) was larceny of a watch. The owner carried it in his waistcoat pocket, with one end of a chain attached to it, and the other end through a button-hole of the waistcoat, and there kept by a watch-key. The prisoner took the watch out of the pocket and forcibly drew the chain through the button-hole. His hand was then seized by the owner's wife; and it appeared that the point of the key had caught on the button of another hole, and was thereby suspended. It was contended that the prisoner was guilty of an attempt only. But the court thought that, as the chain had been removed from the button-hole, the felony was complete. The watch was temporarily, though for a moment, in his possession, it was said. Like this was *Lapier's Case* (1 Leach

Crown Cases, 320), who, snatching at a diamond earring in a lady's ear, it was torn therefrom, but was found caught in the curls of her hair. He was found guilty of robbery from the person, for the earring was in his possession for a moment, separate from the lady's person. And in *Commonwealth v. Luckis* (99 Mass., 431), which was an indictment for an attempt to steal from the person, the prisoner asked an acquittal on the ground that the larceny was complete, and so she could not be convicted of an attempt only. She was seen by a police officer with her hand in the pocket of another. He seized her wrist while her hand was there. She threw up her arm and tore the dress, so that the pocket and pocketbook fell to the ground. There was no evidence that her hand was on the book. The judge charged that if she was arrested in her attempt before her hand reached or disturbed the book, she might be convicted of an attempt; but if her hand had reached or seized the pocketbook, and she altered the position of it in the attempt to secure or retain it, this would be such a caption or asportation as would acquit the defendant; and she was convicted. On exceptions taken to the charge, the court above held: That to justify a conviction, it was necessary to show that she failed in the perpetration of the offence of stealing from the person, which could be complete only when the property was in her full custody or control. It was not indeed, the court said, necessary that the pocketbook should be removed from the pocket, if once within the grasp of the thief, to constitute larceny. But the prisoner must, for an instant, have had perfect control of the property.

To constitute the offence of larceny, there must be a taking or severance of the goods from the possession of the owner. (2 Russ. on Crimes, p. 152, margin 6.) But possession, so far as this offence is concerned, is the having or holding or detention of property in one's power or command. It is the sole control of the property, or of some physical attachment to it; as in the case of *Wilkinson* (1 Leach, 321, note a), where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take, and had the purse in his hand, but the strings of the purse still held to the pocket by means of the keys. This was held to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where

it was before. And so, where goods in a shop were tied by a string to a counter, a thief took up the goods and carried them to the door, as far as the string would let him, and was there stopped. This was held no felony. (2 East Crown Law, 556.) Here was an actual, physical connection of the goods to the person or to the other property of the owner; and the complete carrying away was thwarted, not by the animate, forcible act of the owner taking back that which had for the instant passed from his control, but by the inanimate, self-acting detention of that which held it to the person or to the realty. That needed first to be severed before there could be a carrying away. (And see Philips' Case, 4 City Hall Recorder, 177.)

In *Rex v. Thompson (supra)*, however, and in *Luckis' Case (supra)*, as put in the charge and in the opinion, by the raising of the book out of the pocket of the owner, or by the grasp and movement of it in the pocket, the owner was held to have lost that control of it which is possession, so that the felonious act of larceny was complete. There was no fastening there to be severed. It needed forcible action by him to retake it. Mere quiescence would not do it. Without that action, with the book in the grasp of the thief possessing it, controlling it and carrying it away, it would have been beyond recaption by him. So in the case here. The hand of the plaintiff in error was about the book, controlling it and taking it away; indeed, had taken it away (as in *Walsh's Case, supra*), every part of it, from the space which that part had occupied before his touch. It was in his possession. He directed, and, for the instant of time, controlled its movements. No inanimate, physical thing hindered him. Bull, for that instant of time, did not control or possess it; but, feeling him raising the book, threw up his own hand, pressed the book, caught it as it was going, and regained control and possession of it. But for this action it would have been taken entirely away. Who then, for that instant, controlled it and had it in possession?

There is no essential distinction in the cases. In *Rex v. Thompson (supra)* and in this case, as in the cases of the watch and of the earring, there was a temporary possession by the larcenor, though but momentary.

There was a sufficient *asportavit*.

The judgment of courts below should be affirmed.

All concur.

Judgment affirmed.

MOLTON *v.* THE STATE.

Supreme Court of Alabama, 1895.

105 Ala. 18; 16 So. 795.

DAVE MOLTON was convicted of larceny, and appeals. Reversed.

The State introduced one William Taylor as a witness, who testified that on February 6, 1894 (the trial being at the October Term, 1894), he missed a hog belonging to him, and that, on going to look for it, he came to a thicket, whence the defendant came; that defendant picked up a gun lying near by, and, after advancing toward the witness, spoke to him, and then walked away; that he (the witness) went into the thicket, and found his hog lying therein, dead, with blood running from what appeared to be a freshly-made gunshot wound; that he could not be mistaken as to the defendant's identity; that he knew the defendant well, and had lived as his neighbor for several years. The witness further testified that he did not see the defendant at the hog at all, but that the defendant came from the direction where he found the hog lying in the thicket. The testimony for the defendant tended to prove an *alibi*, being to the effect that on the 6th day of February, at the time specified by the witness, Taylor, he was in the city of Montgomery, and was not at the place where the said Taylor found his hog, a distance of seven miles from Montgomery. The defendant denied all knowledge as to the killing of the hog, and, as a witness in his own behalf, testified that he did not kill the hog.

BRICKELL, C. J. The indictment is founded on the statute (Cr. Code, sec. 3789) which declares the larceny of a hog and of other domestic animals therein enumerated a felony, without

regard to the value of the animal. On the trial the court instructed the jury in these words: "If a man shoots the hog of another with the intent to steal it, and kills the hog, and takes possession of it, he is guilty of larceny; or if he gets near enough to the hog to exercise dominion and control over it, after the killing, with the intent to steal it, he is guilty of larceny thereof." An exception was reserved to the instruction as a whole, and a separate exception to the last clause or member, commencing with the word "or." As a whole, the instruction is not erroneous. The first clause or member hypothesizes every fact essential to constitute larceny. The intent to steal, and the consummation of the intent by the taking possession, which of itself includes an asportation, are the essential elements of the offence of larceny, however it may be defined or described. The last clause or member, however, seems to us erroneous. To constitute larceny, there must be a severance of the possession of the owner and an actual possession by the wrongdoer. The severance of the possession of the owner and the actual possession of the wrongdoer may be but for a moment; the length of time they continue is not important; but, as appreciable facts, they must exist. *Rosc. Cr. Ev.* (7th Ed.) 622; *Frazier v. State*, 85 Ala. 17, 4 South. 691; *Thompson v. State*, 94 Ala. 535, 10 South. 520; *Wolf v. State*, 41 Ala. 412; *State v. Seagler*, 1 Rich. Law, 30; *State v. Alexander*, 74 N. C. 232. That the wrongdoer may be in such position or condition as enables him to exercise the power of taking and carrying away the thing alleged to be stolen is not sufficient. Until he avails himself of the position or condition, and exercises the power by the taking of possession, which, as we have said, involves an asportation, the offence is not complete, however evil may have been his intent. In *State v. Seagler*, *supra* (an indictment for the larceny of a hog), the facts were in all material respects similar to the facts of the present case, and it was held the offence was not complete unless the accused, after killing the hog, had taken possession of it. The court said, though the intent to steal was manifest, to constitute the offence there must be a carrying away, a removal of the goods from where they were, "and the felon must, at least for an instant, be in the entire possession of the goods." In *State v. Alexander*, *supra*, the court said: "To

complete the crime of larceny, it is not sufficient that the defendant had the control of the article,—that is, had the power to remove it,—but there must be an asportation of the thing alleged to have been stolen. It is true a very slight asportation will be deemed sufficient; yet there must be some removal to complete the offence. The case here shows that there was no removal of the hog, but that it remained in *situ*, as it had been shot down.” In *Frazier v. State*, *supra*, said Clopton, J.: “It is said generally that, to constitute the offence, there must be a wrongful taking possession of the goods of another, with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion, so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent.” In *Thompson v. State*, *supra*, said Walker, J.: “To constitute larceny, there must be a felonious taking and carrying away of personal property. There must be such a caption that the accused acquires dominion over the property, followed by such an asportation or carrying away as to supersede the possession of the owner for an appreciable period of time. Though the owner’s possession is disturbed, yet the offence is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control.” The accused may, with the intent to steal, have killed the hog, and may have been near enough to take possession and carry it away; yet the offence of larceny was not complete until the possession of the owner was severed by the taking of actual possession by the accused. If the expressions in the opinions in the cases of *Edmonds v. State*, 70 Ala. 8, and *Croom v. State*, 71 Ala. 14, to which we are referred, assert a contrary doctrine, we cannot adhere to them. The last clause of the instruction is erroneous, and the judgment must be reversed, and the cause remanded.

Bonsall v. State, 35 Ind. 460; *State v. Fenn*, 41 Conn. 590; *Beasley v. State*, 38 N. E. 35; *Hooper v. State*, 25 S. W. 966; *State v. Hill*, 18 S. E. 971; *People v. Taugher*, 61 N. W. 66; *Eckels v. State*, 20 Ohio St. 508; *Edmonds v. State*, 70 Ala. 8; *Com v. Ryan*, 30 N. E. 364; *Clark*, p. 248; *Bishop I.*, Secs. 207 (2), 342 (2), 566; *Wharton*, Sec. 914; *Hawley & McGregor*, p. 192.

NOTE.—At common law, unless one obtained possession of property by subterfuge, he did not commit larceny of it. So a bailee cannot commit larceny of property in his possession until, by breach of his trust, he has terminated the relation of bailor and bailee.

People v. Rae, 66 Cal. 423; State v. Anderson, 25 Minn. 66; State v. Fann, 65 N. C. 317; State v. Chew Muck You, 20 Ore. 215; People v. Taugher, 61 N. W. 66; People v. Tomlinson, 102 Cal. 19; Clark, p. 250; Wharton, Sec. 963.

NOTE.—By some statutes larceny includes embezzlement, and in those jurisdictions the above distinction is unnecessary.

Minn. Stat. 1894, Secs. 6709, 6710, 6711; N. Y. Penal Code, Sec. 528; Clark, p. 250.

(c) Carrying Away.

The taking is not complete unless a removal accompanies it.

STATE v. GREEN.

Supreme Court of North Carolina, 1879.

81 N. C. 560.

INDICTMENT for larceny, tried at Spring Term, 1879, of Pitt Superior Court, before Seymour, J.

The evidence was that the defendant who was in the employ of the prosecuting witness took the key of the witness' safe from his pocket one morning before the witness had dressed, and went to his office, unlocked the safe, took therefrom a drawer containing money, completely removing the same from the safe, and was handling the money when the witness detected him; but the money was not removed from the drawer. Thereupon the defendant's counsel requested the court to charge the jury that there was no evidence of an *asportavit*. The court declined, but instructed the jury that if the defendant removed the drawer from the safe with the felonious intent to steal the money in such drawer, he was guilty. Defendant excepted. Verdict of guilty, judgment, appeal by defendant.

SMITH, C. J. The defendant has been twice convicted under an indictment containing two counts, one for the larceny of one dollar in money, and the other for feloniously receiving the like

sum, once in the inferior, and again on his appeal in the Superior Court of Pitt county. The judgment in each court was the same, that the defendant be confined in the State prison for three years.

The only exception taken and presented in the appeal is to the refusal of the court to charge that the evidence failed to prove such asportation of the money as is necessary to constitute larceny.

We think the judge was correct in declining to give the instruction. "A bare removal from the place in which the thief found the goods, though he does not make off with them," says Mr. Justice Blackstone, defining an element in larceny, "is a sufficient asportation or carrying away." 4 Blackstone Com., 231.

Accordingly it has been held that where one broke open a chest in the dwelling-house of another, nobody being there, and took out the goods and laid them on the floor of the same room, and is then apprehended, or where one drew out a book from the inside of the prosecutor's pocket, an inch above its top, and then, on a movement of the prosecutor's hands, let the book drop and it fell back into the pocket, or where an earring was separated from the ear of a lady in which it was worn, and it fell and lodged in the curls of her hair,—in all these cases the asportation was sufficient. 1 Hale, 508. And so have been the adjudications in this State.

"It is a sufficient carrying away to constitute the offence of larceny," says Settle, J., "if the goods are removed from the place where they were, and the felon has for an instant the entire and absolute possession of them." *State v. Jackson*, 65 N. C., 305. The least removal of an article from the actual or constructive possession of the owner, so as to be under the control of the felon," says Dick, J., "will be a sufficient asportation." *State v. Jones*, *Ibid.*, 395.

The case before us clearly comes within the principle of these adjudications. The defendant had removed the drawer from the safe and was handling the money found in it at the time of his detection, and the act of stealing was complete.

Per Curiam.

No error.

EDMONDS v. STATE.

Supreme Court of Alabama, 1881.

70 Ala. 8.

SOMERVILLE, J. The indictment in this case charges the defendant with the larceny of a hog, which, under the statute, is made a felony, without reference to the value of the animal stolen. Code, 1876, sec. 4358. The only evidence in the case, showing any caption, or asportation of the animal, was the testimony of an accomplice, one Wadworth, who made the following statement: "That shortly after dark, on the 18th of February last, witness met defendant near the horse-lot, on the plantation of one Ilges; that the two went together to witness' house, where the latter procured an axe, and they then returned to the lot. Witness then got some corn, and after giving defendant the axe, by dropping some of the corn on the ground tolled the hog to the distance of about twenty yards; that the defendant then struck the hog with the axe, and the hog squealed, whereupon immediately both witness and defendant ran away, leaving the hog where it was." Upon this state of facts, the court charged the jury, that, if they believed the evidence, it was sufficient to show such a taking and carrying away of the property, if done feloniously, as was necessary to make out the offence of larceny.

We think the court erred in giving this charge, though the question presented is not free from some degree of doubt and difficulty. The usual definition of larceny is, "the felonious taking and carrying away of the personal goods of another." 4 Black. Com. 229. It is defined in Roscoe's Criminal Evidence, as "the wrongful taking possession of the goods of another, with intent to deprive the owner of his property in them." *Ib.* 622. It is a well-settled rule, liable to some few exceptions, perhaps, that every larceny necessarily involves a trespass, and that there can be no trespass, unless there is an actual or constructive taking of possession; and this possession must be entire and absolute. Roscoe's Cr. Ev. 623-24; 3 Greenl. Ev. sec. 154. There must not

only be such a caption as to constitute possession of, or dominion over the property, for an appreciable moment of time, but also an asportation, or carrying away, which may be accomplished by any removal of the property or goods from their original status, such as would constitute a complete severance from the possession of the owner. 1 Greenl. Ev. sec. 154; Roscoe's Cr. Ev. p. 625. It has been frequently held, that to chase and shoot an animal, with felonious intent, without removing it after being shot, would not be such a caption and asportation as to consummate the offence of larceny. *Wolf v. The State*, 41 Ala. 412; *The State v. Seagler*, 1 Rich. (S. C.) 30; 2 Bish. Cr. Law, sec. 797. So, it has been decided, that the mere upsetting of a barrel of turpentine though done with felonious intent, does not complete the offence, for the same reason. *The State v. Jones*, 65 N. C. 395. The books are full of cases presenting similar illustrations.

On the contrary, it is equally well settled, that where a person takes an animal into an inclosure, with intent to steal it, and is apprehended before he can get it out, he is guilty of larceny. 3 Inst. 109. In *Wisdom's Case*, 8 Port. 507, 519, it was said, *arguendo*, by Mr. Justice Goldthwaite, "If one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it, and has it once under his control, the deed is complete; but, if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offence would not be consummated." This principle is, no doubt, a correct one; but the true difficulty lies in its proper application. It is clear, for example, if one should thus entice an animal from the possession, actual or constructive, of the owner, and toll it into his own inclosure, closing a gate behind him, the custody or dominion acquired over the animal might be regarded as so complete as to constitute larceny. 2 Bish. Cr. Law, sec. 806. It is equally manifest that, if one should, in like manner, entice an animal, even for a considerable distance, and it should from indocility, or other reason, follow him so far off as not to come virtually into his custody, the crime would be incomplete.

The controlling principle, in such cases, would seem to be, that the possession of the owner must be so far changed as that the dominion of the trespasser shall be complete. His proximity

to the intended booty must be such as to enable him to assert this dominion, by taking actual control or custody by manucap- tion, if he so wills. If he abandon the enterprise, however, be- fore being placed in this attitude, he is not guilty of the offence of larceny, though he may be convicted of an attempt to com- mit it. *Wolf's Case*, 41 Ala. 412. It would seem there can be no asportation, within the legal acceptance of the word, with- out a previously acquired dominion.

The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them, that there was such a complete caption and asportation as to consummate the of- fence.

The judgment of the Circuit Court is reversed, and the cause is remanded.

State v. Craige, 89 N. C. 475; *State v. Hecox*, 83 Mo. 531; *State v. Hig- gins*, 88 Mo. 354; *Eckels v. State*, 20 Ohio St. 508; *Harrison v. People*, 50 N. Y. 518; *People v. Murphy*, 47 Cal. 103; *Molton v. State*, 16 So. 795; *Clark*, p. 260; *Bishop II.*, Sec. 799 *et seq.*; *Wharton* Sec. 923; *Hawley & McGregor*, p. 198.

(d) Intent.

There must be present a felonious intent to deprive the person permanently of his property.

PEOPLE v. BROWN.

Supreme Court of California, 1894.

105 Cal. 66; 38 Pac. 518.

GAROUTTE, J. The appellant was convicted of the crime of burglary, alleged by the information to have been committed in entering a certain house with intent to commit grand lar- ceny. The entry is conceded, and also it is conceded that ap- pellant took therefrom a certain bicycle, the property of the party named in the information, and of such a value as to con- stitute grand larceny.

The appellant is a boy of seventeen years of age, and for a few days immediately prior to the taking of the bicycle was staying at the place from which the machine was taken, working for his board. He took the stand as a witness, and testified:

"I took the wheel to get even with the boy, and of course I didn't intend to keep it. I just wanted to get even with him. The boy was throwing oranges at me in the evening, and he would not stop when I told him to, and it made me mad, and I left Yount's house Saturday morning. I thought I would go back and take the boy's wheel. He had a wheel, the one I had the fuss with. Instead of getting hold of his, I got Frank's, but I intended to take it back Sunday night; but before I got back they caught me. I took it down by the grove, and put it on the ground, and covered it with brush, and crawled in, and Frank came and hauled off the brush and said: 'What are you doing here?' Then I told him * * * I covered myself up in the brush so that they could not find me until evening, until I could take it back. I did not want them to find me. I expected to remain there during the day, and not go back until evening."

Upon the foregoing state of facts the court gave the jury the following instruction: "I think it is not necessary to say very much to you in this case. I may say, generally, that I think counsel for the defence here stated to you in this argument very fairly the principles of law governing this case, except in one particular. In defining to you the crime of grand larceny he says it is essential that the taking of it must be felonious. That is true; the taking with the intent to deprive the owner of it; but he adds the conclusion that you must find that the taker intended to deprive him of it permanently. I do not think that is the law. I think in this case, for example, if the defendant took this bicycle, we will say for the purpose of riding twenty-five miles, for the purpose of enabling him to get away, and then left it for another to get it, and intended to do nothing else except to help himself away for a certain distance, it would be larceny, just as much as though he intended to take it all the while. A man may take a horse, for instance, not with the intent to convert it wholly and permanently to his own use,

but to ride it to a certain distance, for a certain purpose he may have, and then leave it. He converts it to that extent to his own use and purpose feloniously."

This instruction is erroneous, and demands a reversal of the judgment. If the boy's story be true he is not guilty of larceny in taking the machine; yet, under the instruction of the court, the words from his own mouth convicted him. The court told the jury that larceny may be committed, even though it was only the intent of the party taking the property to deprive the owner of it temporarily. We think the authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently. The illustration contained in the instruction as to the man taking the horse is too broad in its terms as stating a correct principle of law. Under the circumstances depicted by the illustration the man might, and again he might not, be guilty of larceny. It would be a pure question of fact for the jury, and dependent for its true solution upon all the circumstances surrounding the transaction. But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is, Did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof. As directly and fully sustaining this principle we cite: *State v. Davis*, 38 N. J. L. 176; 20 Am. Rep. 367; *State v. Homes*, 17 Mo. 379; 57 Am. Dec. 269, and note 275; *State v. South*, 28 N. J. L. 28; 75 Am. Dec. 250; *State v. Ryan*, 12 Nev. 401; 28 Am. Rep. 802; *State v. Slingerland*, 19 Nev. 135; *Desty's American Criminal Law*, sec. 155 J; *People v. Juarez*, 28 Cal. 380.

For the foregoing reasons it is ordered that the judgment and order be reversed and the cause remanded for a new trial.

^{*} *State v. Conway*, 18 Mo. 322; *Mead v. State*, 25 Neb. 444; *Billard v. State*, 30 Tex. 368; *Donahue v. State*, 23 Tex. App. 457; *Phelps v. People*, 55 Ill. 334; *State v. Coombs*, 55 Me. 477; *Com. v. White*, 11 Cush. 483;

Weaver *v.* State, 77 Ala. 26; Com. *v.* Mason, 105 Mass. 163; Fort *v.* State, 82 Ala. 50; People *v.* Brown, 105 Cal. 66; Lancaster *v.* State, 3 Cold. 339; People *v.* Stone, 16 Cal. 369; Johnson *v.* State, 36 Tex. 375; Bishop II., Sec. 840 *et seq.*; Clark, p. 262; Wharton, Sec. 883; Hawley & McGregor, p. 193.

NOTE.—Statutes generally provide that intent to restore is not a defence unless the restoration is made before the complaint is filed.

Minn. Stat. 1894, Sec. 6729; N. Y. Penal Code, Sec. 549; Truslow *v.* State, 31 S. W. 987.

NOTE.—The crime is only complete upon an asportation of the property; there must be a carrying of it away from the place it occupies, though it be but the slightest removal.

If it is dropped immediately, the offence is committed.

State *v.* Green, 81 N. C. 560; State *v.* Craige, 89 N. C. 475; State *v.* Hecox, 83 Mo. 475; State *v.* Higgins, 88 Mo. 354; Eckels *v.* State, 20 Ohio St. 508; Clark, p. 378, note.

NOTE.—In some jurisdictions larceny is divided into grand and petit, and grand larceny is divided into two degrees.

It is grand larceny in the first degree:

(1) When property of any value is taken from a person in the night time.

(2) When property in value more than \$25 is taken in the night time from any dwelling house, office, bank, shop, warehouse, etc.

(3) When property in value more than \$500 is taken in any manner.

In the second degree:

(1) When, under circumstances not amounting to grand larceny, a person takes or appropriates property of the value of more than \$25, but not exceeding \$500, in any manner.

(2) When property of any value by taking the same from the person of another. Or

(3) By taking the same in the day time from any dwelling house, office, bank, etc.

Minn. Stat. 1894, Secs. 6712, 6713.

NOTE.—Petit larceny is any other larceny.

Minn. Stat. 1894, Secs. 6714, 6717.

NOTE.—Bringing stolen property into the State is a crime in every county through which it passes, or from one county to another it is a crime in either, and can be indicted and tried in either.

Minn. Stat. 1894, Secs. 6721, 6722; State *v.* Kief, 12 Mont. 92.

e.

False Pretence.

False pretence is the designedly obtaining property by deception with the intent to defraud.

ROBERTS v. THE STATE.

Supreme Court of Tennessee, 1859.

2 Head, 501.

CARUTHERS, J., delivered the opinion of the court.

The indictment and conviction in this case was for obtaining twenty dollars in bank notes by false pretences, under the Code, art. 5, p. 844. The term of imprisonment was fixed at seven years.

Code, sec. 4701: "Every person, who by any false pretence, or by any false token, or counterfeit letter, with intent to defraud another, obtains from any person any personal property, on the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction," etc. The difficulty made upon the section is entirely obviated by changing the word on to or, in the third line after the word "property," which was evidently intended, and must be regarded as a clerical error or misprint. It would be nonsense as it stands, and must be read with the change suggested. It would then so read to make the "obtaining" of property, including money, or "obtaining" the name of any one to an instrument, by false pretences, tokens, or counterfeit letters, felony. This last branch of the offence is not in the act of 1842, but is certainly an improvement of it. This reformation of the language of the act, by changing the word "on" to "or" is indispensable to make it intelligible.

It is insisted, that if the plaintiff in error, and his accomplice, Smith, whose case is not now before us, are guilty of any offence,

it is that of passing counterfeit coin, and not the offence charged. This position is correct, if it applies, as we have heretofore held. It was not intended by the act of 1842, or the Code, sec. 4701, to cover or give a new name to the then existing and long established offence of passing counterfeit money, but to create a new felony. So if the crime here consisted of passing counterfeit coin for goods or bank notes, the conviction would be erroneous, because that is not the charge in the indictment.

These are the facts, as stated by the prosecutor, Stephen Gibson:

"On the 10th of February, 1859, he was at a boarding-house, near the Memphis and Charleston Railroad depot, in company with two gentlemen from Arkansas; that while conversing with them, the defendant, Roberts, came up to them and joined in the conversation. He told defendant, Roberts, that he was from Alabama, and a stranger in Memphis. Roberts spoke of the danger to be apprehended by strangers from pickpockets, thieves, and swindlers who infested the depot and city; that they all walked over to the depot, still talking about thieves, etc.; that soon after they reached the depot, and were standing near the lamps, William Smith, who is jointly indicted, came up to where they were standing, and asked Roberts if he could change for him a twenty dollar gold piece. Roberts said he did not know, but would look and see, and pulled out his *port-monnaie* and examined it, and said that he could not, but perhaps the gentleman from Alabama could give him the change. Witness then said he believed he could, and walked to the light with Roberts and Smith, where he pulled out his pocketbook and took therefrom two five dollar bills, one on an Alabama and the other on a South Carolina bank, and a ten dollar bill on the Bank of Tennessee, and handed the same to Smith, who thereupon handed witness what he, at first, took to be a twenty dollar gold piece, but which was in fact a piece of spurious metal, about the size of a twenty-dollar gold piece, which was the color of gold; and upon one side could not be distinguished, without close inspection, from genuine gold coin; but on examination of the other side, it could be easily and readily discovered to be but an advertisement, and did not purport to be gold coin." Smith immediately made off with the bank bills, before the witness had

inspected the metal, which he at once discovered to be base metal, but could not overtake Smith. The defendant denied having any acquaintance with Smith; but made his escape while the prosecutor went after a policeman. They were both soon after arrested, and found to be well acquainted, and both had in possession the same kind of metal pieces passed to defendant. The proof leaves no doubt of the complicity of Roberts with Smith, or the guilt of both.

This was not counterfeit coin, as it did not purport to be a representation of gold coin, when examined, but a false imitation of it only on one side. It was a trick, and base contrivance, and false pretence to obtain money or property fraudulently. This is the offence charged against them. This objection, then, cannot be maintained.

Again, it is insisted that the imposition could have been easily detected by ordinary care, and therefore it does not constitute the offence charged. This does not fall within that class of cases contained in the books referred to. It was calculated to deceive, and did deceive under the circumstances. The time, place, and circumstances are all to be taken into view in determining this question. Only one side of the metal was presented, and that by a dim light, and in the hurry and confidence of the moment, was calculated to deceive and accomplish the fraudulent purpose. We are not disposed to carry this defence to the extent of some of the cases relied upon, to screen the guilty thief from the penalty of the law for this most detestable species of larceny. The trick must be obvious and palpable to ordinary observation—the circumstances all considered—to constitute this defence.

The conviction is well sustained by the law and evidence, and the judgment is affirmed.

STATE v. MATTHEWS.

Supreme Court of North Carolina, 1884.

91 N. C. 635.

INDICTMENT for false pretence, tried at Fall Term, 1883, of Rockingham Superior Court, before MacRae, J.

The facts in the case as developed by the evidence are, that defendant went to the store of R. H. Smith in September, 1883, and asked Smith to credit him for some goods, and stated that the child of his sister-in-law was dead, and that the articles he wished to buy were necessary for the burial of the child. Smith refused to let the defendant have the goods at first, but he begged so earnestly that he finally sold him a piece of cotton cloth on credit. Defendant promised to pay for it, but it was the charitable object alone that induced Smith to let him have the goods, because he said his sister-in-law's child was dead, and she needed the cloth to bury it. But at the time of the transaction the defendant had no sister-in-law, and the statement as to the death of the child was false.

The defendant upon this state of facts requested the court to charge the jury that he was not guilty, but the court refused to give the charge.

There was a verdict of guilty and judgment thereon, from which the defendant appealed.

ASHE, J. It is well settled that to constitute the crime of false pretence under Bat. Rev., ch. 32, sec. 67, The Code, sec. 1025, that there must be a false pretence of a subsisting fact; the pretence must be knowingly false; money, goods or other thing of value must be unlawfully obtained by means of the false pretence, and with the intent to cheat and defraud the owner of the same. *State v. Dickson*, 88 N. C., 643, and cases there cited to the same effect.

Here, the defendant failing to purchase the goods upon a credit, resorted to the falsehood of stating that his sister-in-law's child was dead and the cloth was needed for its burial. The death of the child was the false pretence of a subsisting fact. The defendant had no sister-in-law, and no child of a sister-in-law was dead. He knew the statement was false, and could have been made with no other purpose than to cheat and defraud Smith of his goods. And the goods were obtained by means of the false pretence. These facts bring the case fully up to the requirements of the statute.

It can make no sort of difference what motive prompted Smith to part with his goods, whether for the sake of gain or from feelings of charity.

It is certainly a very lame defence, set up by the defendant, that he is not guilty because the goods of the owner were parted with under the promptings of a charitable motive, when he himself, by his false statements, has excited the benevolent feelings through the influence of which he obtained the goods. If he had not made the false statement as to the death of the child, the owner of the goods would not have had his charitable sympathy aroused, and but for those feelings he would not have parted with his goods. The goods consequently were obtained by means of the false pretence.

There is no error. This must be certified to the Superior Court of Rockingham county, that the case may be proceeded with according to law.

No error.

Affirmed.

People v. Rai, 66 Cal. 423; State v. Moore, 111 N. C. 667; State v. Willard, 109 Mo. 242; State v. Dickson, 88 N. C. 643; State v. Phifer, 65 N. C. 321; Clark, p. 278 *et seq.*; Bish. I., Sec. 586; Wharton, Sec. 1130; Hawley & McGregor, p. 212.

NOTE.—Statutes indicate what acts will constitute the offence.

N. Y. Penal Code, Secs. 168, 339, 382, 529, 544, 567, 568, 569, 570; Minn. Stat. 1894, Secs. 6743-6754, 6758-6760.

f.

Embezzlement.

“Embezzlement is the fraudulent appropriation of another's property by one having the lawful possession.”

COMMONWEALTH v. RYAN.

Supreme Judicial Court of Massachusetts, 1892.

155 Mass. 523; 30 N. E. 364.

HOLMES, J. This is a complaint for embezzlement of money. The case for the government is as follows: The defendant was employed by one Sullivan to sell liquor for him in his store. Sul-

livan sent two detectives to the store, with marked money of Sullivan's, to make a feigned purchase from the defendant. One detective did so. The defendant dropped the money into the money drawer of a cash register, which happened to be open in connection with another sale made and registered by the defendant, but he did not register this sale, as was customary, and afterward—it would seem within a minute or two—he took the money from the drawer. The question presented is whether it appears, as matter of law, that the defendant was not guilty of embezzlement, but was guilty of larceny, if of anything. The defendant asked rulings to that effect on two grounds: first, that after the money was put into the drawer it was in Sullivan's possession, and therefore the removal of it was a trespass and larceny; and secondly, that Sullivan's ownership of the money, in some way not fully explained, prevented the offence from being embezzlement. We will consider these positions successively.

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian; *Commonwealth v. King*, 9 Cush. 284; while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny. *Commonwealth v. Berry*, 99 Mass. 428. *Commonwealth v. Davis*, 104 Mass. 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offence. 2 Leach (4th ed.), 843, 848, note; 1 Leach (4th ed.), 35, note; 2 East, P. C. 568, 571.

The history of it is this. There was no felony when a man received possession of goods from the owner without violence. Glanv., bk. 10, c. 13. Y. B. 13 Edw. IV. 9, pl. 5. 3 Co. Inst. 107. The early judges did not always distinguish clearly in their language between the delivery of possession to a bailee and the giving of custody to a servant, which indeed later judges some times have failed to do. E. g. Littleton in Y. B. 2 Edw. IV. 15, pl. 7. 3 Hen. VII. 12, pl. 9. *Ward v. Macauley*, 4 T. R. 489, 490. When the peculiar law of master and servant was

applied either to the master's responsibility or to his possession, the test seems to have been whether or not the servant was under the master's eye, rather than based on the notion of status and identity of person, as it was at a later day. See *Byington v. Simpson*, 134 Mass. 169, 170. Within his house a master might be answerable for the torts of his servant, and might have possession of goods in his servant's custody, although he himself had put the goods into the servant's hands; outside the house there was more doubt; as when a master intrusted his horse to his servant to go to market. Y. B. 21 Hen. VII. 14, pl. 21. T. 24 Edw. III. Bristol, in Molloy, *De Jure Maritimo*, bk. 2, c. 3, sec. 16. Y. B. 2 Hen. IV. 18, pl. 6. 13 Edw. IV. 10, pl. 5; S. C. Bro. Abr. Corone, pl. 160. Staundforde, I., c. 15, fol. 25; c. 18, fol. 26. 1 Hale, P. C. 505, note. See *Heydon & Smith's Case*, 13 Co. Rep. 67, 69; *Drope v. Theyar*, Popham, 178, 179; *Combs v. Bradley*, 2 Salk. 613; and, further, 42 Ass. pl. 17, fol. 260; 42 Edw. III. 11, pl. 13; Ass. Jerus. (ed. 1690), cc. 205, 217. It was settled by St. 21 Hen. VIII. c. 7, that the conversion of goods delivered to a servant by his master was felony, and this statute has been thought to be only declaratory of the common law in later times, since the distinction between the possession of a bailee and the custody of a servant has been developed more fully, on the ground that the custody of the servant is the possession of the master. 2 East, P. C. 564, 565. *The King v. Wilkins*, 1 Leach (4th ed.), 520, 523. See *Kelyng*, 35; *Fitzh. Nat. Brev.* 91 E; *Blosse's Case*, Moore, 248; S. C. Owen, 52, and *Gouldsb.* 72. But probably when the act was passed it confirmed the above mentioned doubt as to the master's possession where the servant was intrusted with property at a distance from his master's house in cases outside the statute, that is, when the chattels were delivered by a third person. In *Dyer*, 5a, 5b, it was said that it was not within the statute if an apprentice ran off with the money received from a third person for his master's goods at a fair, because he had it not by the delivery of his master. This, very likely, was correct, because the statute only dealt with delivery by the master; but the case was taken before long as authority for the broader proposition that the act is not a felony, and the reason was invented to account for it that the servant has possession, because the money is de-

livered to him. 1 Hale, P. C. 667, 668. This phrase about delivery seems to have been used first in an attempt to distinguish between servants and bailees; Y. B. 13 Edw. IV. 10, pl. 5; Moore, 248; but as used here it is a perverted remnant of the old and now exploded notion that a servant away from his master's house always has possession. The old case of the servant converting a horse with which his master had intrusted him to go to market was stated and explained in the same way, on the ground that the horse was delivered to the servant. Crompton, Just. 35b, pl. 7. See *The King v. Bass*, 1 Leach (4th ed.), 251. Yet the emptiness of the explanation was shown by the fact that it still was held felony when the master delivered property for service in his own house. Kelyng, 35. The last step was for the principle thus qualified and explained to be applied to a delivery by a third person to a servant in his master's shop, although it is possible at least that the case would have been decided differently in the time of the Year Books; Y. B. 2 Edw. IV. 15, pl. 7; Fitzh. Nat. Brev. 91 E; and although it is questionable whether on sound theory the possession is not as much in the master as if he had delivered the property himself. *Rex v. Dingley* (1687), stated in *The King v. Bazeley*, 2 Leach (4th ed.), 835, 841, and in *The King v. Meeres*, 1 Show. 50, 53. *Waite's Case* (1743), 2 East, P. C. 570; S. C. 1 Leach (4th ed.), 28, 35, note. *Bull's Case*, stated in *The King v. Bazeley*, 2 Leach (4th ed.), 835, 841; S. C. 2 East, P. C. 571, 572. *The King v. Bazeley*, *ubi supra*; *Regina v. Masters*, 1 Den. C. C. 332. *Regina v. Reed*, Dears. C. C. 257, 261, 262.

The last mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient, to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place. *Regina v. Reed*, Dears. C. C. 257. No doubt a final deposit of money in the till of a shop would have the effect. *Waite's Case*, 2 East, P. C. 570, 571; S. C. 1 Leach (4th ed.), 28, 35, note. *Bull's Case*, 2 East, P. C. 572; S. C. 2 Leach (4th ed.), 841, 842. *The King v. Bazeley*, 2 East, P. C. 571, 574; S. C. 2 Leach (4th ed.), 835, 843, note. *Regina*

v. Wright; *Dears. & Bell*, 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot and has not lost his power over it; as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself. *Sloan v. Merrill*, 135 Mass. 17, 19. *Jefferds v. Alvard*, 151 Mass. 94, 95. *Commonwealth v. Drew*, 153 Mass. 588, 594.

It follows from what we have said, that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that, if the defendant before he placed the money in the drawer intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny. The distinction may be arbitrary, but, as it does not affect the defendant otherwise than by giving him an opportunity, whichever offence he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

With regard to the defendant's second position, we see no ground for contending that the detective in his doings was a servant of Sullivan, or that he had not a true possession of the money, if that question were open, which it is not. The only question reserved by the exceptions is whether Sullivan's ownership of the money prevented the defendant's act from being embezzlement. It has been supposed to make a difference if the right of possession in the chattel converted by the servant has vested in the master previous to the delivery to the servant by the third person. 1 Eng. Crim. Law Com'r's Rep. (1834), 31, pl. 4. But this notion, if anything more than a defective statement of the decisions as to delivery into the master's barge or cart (*Rex v. Walsh*, 4 Taunt. 258, 266, and *Regina v. Reed*, *ubi supra*), does not apply to a case like the present, which has been regarded as embezzlement in England for the last hundred years. *Bull's Case*, stated in *The King v. Bazeley*, 2 Leach (4th ed.), 835, 841; S. C. 2 East, P. C. 571, 572. *The King v. Whittingham*, 2 Leach (4th ed.), 912. *The King v. Headge*, 2 Leach,

(4th ed.), 1033; S. C. Russ. & Ry. 160. *Regina v. Gill*, Dears. C. C. 289. If we were to depart from the English decisions, it would not be in the way of introducing further distinctions. See *Commonwealth v. Bennett*, 118 Mass. 443, 454.

Exceptions overruled.

Fagnan v. Knox, 40 N. Y. Superior Ct. 41; *Com. v. Davis*, 104 Mass. 548; *People v. Hennessey*, 15 Wend. 148; *Com. v. King*, 9 Cush. 284; *State v. Adams*, 108 Mo. 208; *Fulton v. State*, 8 English 168; *Com. v. Concannon*, 5 Allen 502; *Com. v. Hays*, 14 Gray 62; *Kribs v. People*, 82 Ill. 425; *State v. Herges*, 55 Minn. 464; *Clark*, p. 270; *Bish. I.*, Sec. 567 (2); *Wharton*, Sec. 1009; *Hawley & McGregor*, p. 202.

NOTE.—The penal codes of the various States provide for embezzlement as it was not a common law offence, and in some the provision governing larceny also covers embezzlement.

N. Y. Penal Code, Secs. 470, 472, 528, 541, 548, 549; Minn. Stat. 1894, Secs. 6709-6711.

g.

Malicious Mischief.

Is the willful destruction of any property through malice to the owner.

COMMONWEALTH *v.* WALDEN.

Supreme Judicial Court of Massachusetts, 1849.

3 Cush. 558.

WILDE, J. This is an indictment for malicious mischief, wherein the defendant is charged with the willful and malicious shooting, and severely injuring, the mare of one Robert Noble, contrary to the Rev. Sts. c. 126, sec. 39. The evidence is not reported; but, whatever it was, the court, in the instruction to the jury, defined the word "maliciously," in said section, to mean "the willfully doing of any act prohibited by law, and for which the defendant had no lawful excuse; and that moral turpitude of mind was not necessary to be shown." If this definition of the crime charged were correct, it would follow that the

words "willfully and maliciously" were intended by the legislature to be understood as synonymous, and that the statute is to be construed in the same manner as it would be if the word "maliciously" had been omitted. Such a construction, we are of opinion, cannot be sustained; for if it could be, it would follow, that a person would be liable to be punished criminally, and with great severity, for every willful trespass, however trifling the injury might be, to the personal property of another, which could not be justified or excused in a civil action against him, for the recovery of damages, by the owner. We do not suppose the learned judge intended to be so understood by the jury; but they might so understand him. As to that part of the instruction, that moral turpitude of mind was not necessary to be shown, whether correctly stated or not, we do not think it material to consider. The question is not whether the jury were rightly instructed as to what facts would not constitute malice, but as to what facts would constitute malice, or be presumptive and conclusive proof of it. The learned judge was probably of opinion, that if the mare was injured, as alleged, by the discharge of a gun, loaded with powder and shot, that, *ipso facto*, would be conclusive proof of malice. But that question, we think, should have been submitted to the jury. The gun might have been loaded for the purpose of shooting small birds, with a very light charge of powder, and very fine shot, which would not be likely to kill or do great bodily harm; and we do not know, that any great bodily harm was done. The only facts established by the verdict are, that the mare was injured by the defendant, by the discharge of a gun loaded with powder and shot, and that the act was done willfully; but an act may be unlawful, and may be done willfully, with or without malice, according to the evidence of the motive, and of the circumstances attending the transaction. The evidence, therefore, should have been submitted to the jury, with instructions, that they would not be warranted in finding a verdict of guilty, unless the injury charged in the indictment was done by the defendant, not only willfully, but also maliciously; that if the injury was done intentionally and by design, and not by mistake, accident, or inadvertence, that would fully support the allegation in the indictment, that it was done willfully, according to the true mean-

ing of the statute. But the jury might infer malice from the fact, that the injury was done by the discharge of a gun loaded with powder and shot, unless the inference were rebutted by the evidence, showing that the gun was so loaded that it was not likely to kill or do any great bodily harm; and the jury should have been so instructed. The jury should also have been instructed, that, to authorize them to find the defendant guilty, they must be satisfied, that the injury was done either out of a spirit of wanton cruelty or wicked revenge. Malicious mischief, amounting to a crime, is so defined by Blackstone, 4 Bl. Com. 244, and in Jacob's Law Dictionary, by Tomlin, under the title "Mischief, Malicious;" and we have no doubt that such is the true definition of the crime.

Exceptions sustained, and new trial granted.

STATE *v.* WATTS.

Supreme Court of Arkansas, 1886.

48 Ark. 56; 2 S. W. 342.

BATTLE, J. Levi Watts was indicted in the Sebastian Circuit Court, for the Greenwood district, for malicious mischief committed by him on the 10th day of February, 1885, in the Greenwood district, by then and there unlawfully, willfully, maliciously and mischievously cutting, tearing down, injuring and breaking the telephone wire of the Fort Smith, Greenwood and Waldron Telephone Company, it being of the value of fifty-five dollars. He demurred to the indictment, and the court sustained the demurrer and discharged him.

The only question in this case is, was the act charged in the indictment an indictable offence at common law? There was no statute making it a crime at the time it is alleged to have been committed.

It is difficult to state with minute precision, what is necessary to constitute malicious mischief at common law. It has been so much legislated upon, and at such an early day, that its common law limits are indistinct. Blackstone classes it along with lar-

cey and forgery, and, after treating of larceny, says: "Malicious mischief, or damage, is the next species of injury to private property which the law considers a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, which is some, though a weak excuse, but either out of a spirit of wanton cruelty, or black and diabolical revenge, in which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only trespass at common law, is now, by a multitude of statutes, made penal in the highest degree." And he then enumerates several statutes which elevated it to a felony.

Some judges, relying on this passage, and understanding the word "trespass" therein according to its modern signification, have denied that the offence of malicious mischief exists under the common law of this country. But, upon a careful reading, it is obvious that the word "trespass" is used by Blackstone in this passage in the sense of misdemeanor. It is used by him in various places in his Commentaries in that sense; as, where, speaking of officers who voluntarily suffer prisoners to escape, he says: "It is generally agreed that such escapes amount to the same kind of offence and are punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony or trespass." And again, where he says: "In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quae de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors." 1 Bishop on Crim. Law, secs. 568, 569, 625.

Without further discussion, it is sufficient to say that, according to the weight of authority and the better and prevailing opinion, the offence of malicious mischief exists under the common law of this country.

This offence includes all malicious physical injuries to the rights of another which impair utility or materially diminish value. "Thus, it has been considered an offence at common law to maliciously destroy a horse belonging to another; or a cow; or a steer; or any beast whatever which may be the property of an-

other; to wantonly kill an animal where the effect is to disturb and molest a family; to maliciously cast the carcass of an animal into a well in daily use; to maliciously poison chickens; to fraudulently tear up a promissory note, or break windows; to maliciously set fire to a number of barrels of tar belonging to another; to maliciously destroy any barrack, or corn crib; to maliciously girdle or injure trees or plants kept either for use or ornament; to maliciously break up a boat; to maliciously injure or deface tombs; and to maliciously strip from a building copper pipes or sheeting." These illustrations serve to indicate what is malicious mischief, and the subjects of the offence. Wharton on Crim. Law (19 Ed.), secs. 1067, 1076, and authorities cited.

We are satisfied that the act charged in the indictment in this case constitutes the offence of malicious mischief; and that the demurrer to the same should have been overruled. The judgment of the court below is therefore reversed, and this cause is remanded, with instructions to overrule the demurrer and for other proceedings.

State v. Linde, 54 Ia. 139; *Duncan v. State*, 49 Miss. 331; *Goforth v. State*, 8 Humph. 37; *Parris v. People*, 76 Ill. 274; *State v. Beekman*, 27 N. J. L. 124; *Nehr v. State*, 35 Neb. 638; *State v. Williamson*, 68 Ia. 351; *Woodward v. State*, 28 S. W. 204; *Brady v. State*, 26 S. W. 621; *State v. McBeth*, 49 Kan. 584; *Browder v. State*, 30 Tex. App. 614; *State v. Robinson*, 3 Dev. & B. 130; *Com. v. Williams*, 110 Mass. 401; *Barlow v. State*, 120 Ind. 56; *Brown's Case*, 3 Me. 177; *Thomas v. State*, 30 Ark. 433; *Clark*, pp. 290, 291; Wharton, Sec. 1067.

NOTE.—Acts constituting this offence are specified in the various statutes.

Minn. Stat. 1894, Secs. 6686, 6772, 6775-6791; N. Y. Penal Code, Secs. 505, 635, 640.

INDEX.

A

Abduction defined, 408.

Abortion defined, 392.

Advising or supplying drugs, 406.

Woman taking drugs guilty of crime, 406.

Wilful killing of unborn quick child, manslaughter, 406.

Administration of drugs to a woman pregnant or not, 406.

Death of child, woman guilty of manslaughter, 406.

Manufacture of goods to cause miscarriage, 406.

Keeping articles to prevent conception, 406.

Attempt to conceal dead body misdemeanor, 406.

Accessories, 149.

Accident or Misadventure, responsibility for, 90.

Act, individual, 138.

Joint, 138.

By principals, 149.

Of first degree defined, 149.

Of second degree defined, 151.

By accessories, 156.

Before the fact defined, 156.

After the fact defined, 159.

Attempts defined, 161.

Conspiracies defined, 170.

Solicitations defined, 177.

Consent defined, 181.

Condonation defined, 184.

Justified by public policy, 129.

Wrongful intent, 136.

Overwhelming necessity relieves, of its criminality, 76.

Adultery defined, 407.

At Common Law, 408.

Arrest, killing in resisting lawful. See **MURDER**, 335.

Manslaughter, 357, n.

Arson defined, 411.

Elements, 411.

Burning, 411.

Dwelling houses, 411.

Another's house, 417, 421.

Occupied by human beings, 421.

In night time, 421.

In day time, 422.

Degrees of, 421, 422.

Assault defined, 361.

Consent as a defence, 365.

Degrees of, 365, 366.

Justifiable and excusable, 366.

Assaults, aggravated, what are specific intents in, 365.

Assisting to Escape, 271.

Attempt defined, 161.

Attempt to Escape, 271.

B

Basins, jurisdiction of States over, 242.

Bays, jurisdiction of States over, 242.

Bestiality defined, 409.

Boundary, jurisdiction extends to on sea coast, 223.

Bribery defined, 257, 262.

Gist of offence, 257.

Burden of Proof in Insanity, 39.

Burglary defined, 422.

Elements, 422.

Breaking defined, 422.

May be constructive, 430.

Entry defined, 430.

Intent defined, 433, 438.

The house, 438, 444.

Night time, 444.

Degrees of, 445.

Buggery defined, 409.

C

- Capacity**, affecting intent, 27.
 Effect of coverture on, at Common Law, 53.
 As modified by statute, 53.
 Of infants, 27.
 Effect of insanity on, 30.
 Test of, in insanity, 30.
- Carelessness.** See NEGLIGENCE, 65.
- Chastisement**, Manslaughter, 357, n.
- Coercion**, 67.
- Common Law**, abrogated by statute, 212.
 Crimes, not recognized in United States Courts, 212.
 Criminal Law prescribed by, 203.
- Concurrent Jurisdiction**, of United States and States, 253.
- Condonation** defined, 184.
- Consent** defined, 181.
 As a defence to assault, 365.
 As a defence in rape, 384.
- Conspiracy** defined, 170.
- Constructive Intent** defined, 5.
- Cooling Time.** See HOMICIDE, MANSLAUGHTER, 347.
- Corporations**, criminal responsibility, 54.
 Capacity of, 54.
- Counties**, jurisdiction of crime committed near boundary, 248.
 Jurisdiction over stolen property passing through, 248.
 Limits of jurisdiction, 242.
- Coverture**, effect on capacity, 53.
- Creeks**, jurisdiction of States over, 242.
- Crimes** against elective franchise, 256.
 Against executive power, 261.
 Against legislative power, 261.
 Against property defined, 411.
 Against public justice, 262.
 Bribery, 262.
 Perjury, 264.
 Against the Government, 255.
 Against the person defined, 272.
 Specific defined, 255.

- Criminal Law**, Common Law abrogated by, 212.
How prescribed, by Common Law, 203.
by statute, 209.

D

- Death**, corpus delicti, 277.
Cause of, 285.
Time of, 289.
- Defence** of person, 299.
Of habitation, 300.
Of self, 97.
Of property, 106.
 in general, 106.
 of habitation, 113.
Excusable homicide in self-, 299.
- Definition of Crime**, 1.
- Dwelling** outside, jurisdiction of State over, 248.
- Duress**, 67.

E

- Elective Franchise**, crimes against, 256.
- Embezzlement** defined, 473.
- Enforcement of Law**, officer, responsibility of, 121.
- Escapes**, attempt, 271.
Assisting, 271.
Permitting, 271.
- Evidence**, falsifying or destroying, 271.
- Excusable Homicide**, 297.
- Excuse**, ignorance of law as an, 63.
- Excuse and Justification**, mistake of fact, 88.
- Executive Power**, crimes against, 261.

F

- False Pretence**, 469.
- Falsifying or Destroying Evidence**, 271.
- Felonious Homicides**, suicide, 317.
At Common Law, 317.
Aiding or assisting, 317.
Murder, 300.

- Felony** defined, 196.
 At Common Law, 196.
 By statute, 196
 To commit a, 333.
- Forgery** defined, 446.
- Forging**, etc., public records, 271.
- Fornication** defined, 409.
 In Minnesota, 410.

G

- Gambling**, 410.
- Government**, crimes against, 255.

H

- Habitation**, defence of, 113.
- Harbors**, jurisdiction of States over, 242.
- Havens**, jurisdiction of States over, 242.
- Homicide** defined, 272.
 Elements, human being, 272.
 Death, corpus delicti, 277.
 Cause of, 285.
 Time of, 289.
 Duty to retreat, 296.
 Excusable, 297.
 Misadventure, 297.
 Defence of person, 299.
 habitation, 300.
- Felonious**, murder, 300.
 Resulting from attempt, 322.
 To kill the person killed, 322.
 To kill another than person killed, 326.
 To do great bodily harm, 331.
 Degree of, 326, 330, 331.
- In punishment of crimes justifiable**, 290.
- In prevention of crimes justifiable**, 291.
- Kinds**, 290.
- Justifiable**, defined, 290.
- Manslaughter** defined, 339.
- Voluntary**, defined, 339.
- In passion aroused by provocation**, 339.

- In resisting unlawful arrest, 347.
- Manslaughter, what is, in murder, 347.
 - Cooling time, 347.
 - Involuntary, in doing unlawful act, misdemeanor, 350.
 - In doing a lawful act, negligence, 357.
 - Self defence, 357, n.
 - Chastisement, 357, n.
 - Arrest, 357, n.
- Murder, death resulting from arrest and of lawful arrest, 335.
- When one may kill to prevent a felony, 296.
- Hudson River**, jurisdiction over, 247.

I

- Ignorance of Law as an excuse**, 63.
- Incest** defined, 409.
- Individual Act**, 138.
- Infancy**, capacity of, ages 7 to 14, above 14, under 7, 27.
- Insanity** defined, 30.
 - Effect of, on capacity, 30.
 - Burden of proof of, 39.
- Intent** defined, 1.
 - Constructive, 5.
 - Specific, 10.
 - Motive, 12.
 - Criminal, 19.
 - Capacity as affecting, 27.
 - Wrongful, 136.
- Intoxication**, as a defence, in general, 46.
 - At Common Law, 53.
 - As modified in some States, 53.
 - To specific intent, 53.

J

- Joint Act**, 138.
- Jurisdiction**, counties, jurisdiction over stolen property passing through, 248.
 - Exclusive of United States, 248.

- Concurrent of States and United States, 253.
- In general, 213.
- Locality, 213, 222.
- In libel cases, 248.
- Limits of States and Counties, 242.
- Limits of the United States, 223.
- Limits of United States and States made coincident by statute, 247.
 - Non-navigable rivers, 247.
 - Of Hudson River, 247.
 - Of Ohio River, 247.
 - Of ships, 223.
 - Over Mississippi River, Minnesota and Wisconsin, 247.
 - "Thread of the stream" in determining, 247.
 - United States Admiralty and Maritime Courts, 248.
 - United States within State limits, 248.
 - Of crime committed near boundary of counties, 248.
 - Of offences committed on railroads, 248.
 - Of State, duelling outside, 248.
- Justifiable and Excusable, assaults and batteries, 366.
- Justifiable Homicide defined, 290.
 - In punishment of crimes, 290.
 - In prevention of crimes, 291.
- Justification and Excuse, mistake of fact, 88.

L

- Larceny defined, 451.
 - Elements, 451.
 - Personal property, 451.
 - The Act, 453.
 - Carrying away, 461.
 - The intent, 465.
 - Degrees of, 468.
- Legislative Power, crimes against, 261.
- Libel defined, 380.
 - Malice, 380.

- Truth as a defence, 380.
- Jurisdiction in cases of, 248.
- Limits of the United States. See JURISDICTION, 223.
- Locality in determining jurisdiction, 213.
- Lotteries, 410.

M

- Malice in Libel, 380.
- Malicious mischief defined, 478.
- Manslaughter defined, 339.
 - Voluntary, defined, 339.
 - In passion aroused by provocation, 339.
 - In resisting unlawful arrest, 347.
- Marine League, boundary extends on sea coast, 223.
- Mayhem defined, 358.
 - Specific intent, 361.
 - Recovery before trial a bar, 361.
 - To secure alms, etc., 361.
- Minnesota and Wisconsin, Concurrent Jurisdiction over Mississippi River, 247.
- Misadventure, excusable homicide, 297.
- Misdemeanor defined, 200.
- Mississippi River, jurisdiction of, between Wisconsin and Minnesota concurrent, 247.
- Mistake of fact as excuse or justification, 88.
- Motive defined, 12.
- Murder defined, 316.
 - Death resulting from resistance of lawful arrest, 335.
 - Felonious homicide, 300. See HOMICIDE.
 - And manslaughter, 316.

N

- Necessity, 76.
- Negligence in doing lawful act, manslaughter, 357.
 - May supply criminal intent or malice, 65.
 - When criminal, 65.
- Non-navigable Rivers, jurisdiction on, 247.

O

"Obscene" defined, 17.

Officer of the Law, responsibility of, in enforcement of the law,
121.

Ohio River, jurisdiction over, 247.

P

Perjury defined, 264.

Essentials of, 270.

Subornation of, 270.

Permitting to Escape, 271.

Person, crimes against, defined, 272.

Petit Treason defined, 195, 256.

Presumptions as to Capacity, 27.

Prevention of Crime, justifiable homicide, 291.

Principals, 149.

Prison Breach defined, 271.

Assisting, 271.

By officer, 271.

Probable Cause defined, 338.

Proof of Insanity, burden of, 39.

Property, crimes against, defined, 411.

Defence of, 106.

Publication in Libel, 380.

Public Justice, crimes against, bribery, 262.

Public Policy, acts justified by, 129.

Punishment of Crimes, homicide in, justifiable, 290.

R

Rape defined, 381.

Presumption as to capacity, 383.

Consent as a defence, 384.

Fraud in procuring consent, 388.

Incapacity to consent, 389.

Penetration, 389.

Rescue, 271.

- Retreat**, modern doctrine, 296.
- Right and Wrong Test of Insanity**, 30.
- Rivers**, jurisdiction over, Ohio and Hudson, 247.
 - Mississippi, 247.
 - Jurisdiction of States over, 242.
- Robbery** defined, 367.
 - The taking, 367.
 - Force and violence, 371.
 - Fear, 377.
 - Degrees of, 379.

S

- Sabbath Breaking**, 410.
- Sea Coast**, boundary on, 223.
- Seduction** defined, 389.
- Self-Defence**, 97.
 - Justifiable assaults, 386.
 - Manslaughter, 357, n.
- Sepulchre**, violating, 410.
- Ships**, jurisdiction determined, 223.
- Sodomy** defined, 409.
- Solicitation** defined, 177.
- Specific Crimes**, defined, 255.
- Specific Intent**, 10,
 - Ignorance of law as affecting, 63.
 - In aggravated assaults, 365.
 - Intoxication a defence, when an essential ingredient, 53.
 - Mayhem, 361.
- State**, jurisdiction of United States within, 248.
- States**, limits of jurisdiction, 242.
 - And United States, concurrent jurisdiction, 253.
- Statute**, criminal law prescribed by, 209.
 - Abrogates Common Law, when 212.
- Subornation of Perjury**, 270.
- Suicide**, aiding or assisting, 317.
 - Attempt to commit, 322.

T

- Tests of Insanity**, right and wrong, 30.
 Irresistible impulse, 34.
 Emotional insanity, 39.
 Moral insanity, 39.
- "Thread of the Stream,"** what is, in determining jurisdiction, 247.
- Treason** defined, 185, 255.
 Misprision of treason, defined, 256.
 Overt act in, 256.
 Petit defined, 195, 256.
 Those in league guilty, 256.
 Conviction of witnesses, 256.
- Truth as a defence to libel**, 380.

U

- United States**, jurisdiction of, within State limits, 248.
 Limits of jurisdiction, 223.
 Territorial limits of States and, 242.
 And States, concurrent jurisdiction, 253.
 Courts, no Common Law crimes recognized in, 212.

W

- Wisconsin and Minnesota**, Concurrent jurisdiction over Mississippi River, 247.
- Wrongful Intent**, 136.





UC SOUTHERN REGIONAL LIBRARY FACILITY



A 000 699 346 3

